Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

STATE OF TENNESSEE, and
TENNESSEE DEPARTMENT OF
ENVIRONMENT AND CONSERVATION,

Petitioners,

v.

UNITED STATES DEPARTMENT OF
TRANSPORTATION, RESEARCH AND
SPECIAL PROGRAMS ADMINISTRATION,
and ASSOCIATION OF WASTE
HAZARDOUS MATERIALS TRANSPORTERS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Hazardous Materials Transportation Act, specifically 49 U.S.C. § 5125(d)(1), a private party with standing may commence an administrative proceeding against a State to obtain a decision from the United States Department of Transportation about whether the State's law is preempted. Congress intended the agency's preemption decision to be binding on the State. Is a § 5125(d)(1) proceeding agency adjudication barred by state sovereign immunity under this Court's decision in *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002)?

LIST OF PARTIES

All of the parties to this civil case are named in the caption.

There are no entities to report or list in accordance with Supreme Court Rule 29.6.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion of the Sixth Circuit Court of Appeals is published. *Tennessee v. U.S. Dept. of Transportation*, 326 F.3d 729 (6th Cir. 2003). The Sixth Circuit's opinion and the judgment order filed on April 23, 2003 are set forth at Appendix pages 1-17.

The order of the United States District Court for the Middle District of Tennessee rejecting the Magistrate Judge's report and recommendation is unpublished. *Tennessee, et al. v. U.S. Dept. of Transportation, et al.*, No. 3:99-1126 (M.D. Tenn., entered Feb. 27, 2001). The Magistrate Judge's report and recommendation is unpublished. *Tennessee, et al. v. U.S. Dept. of Transportation, et al.*, No. 3:99-1126 (M.D. Tenn., filed Nov. 9, 2000). The District Court's order and the Magistrate Judge's report and recommendation are set forth at Appendix pages 18-82.

The preemption decision of the United States Department of Transportation is published. *Preemption Determination No. 21(R), Tennessee Hazardous Waste Transporter Fee and Reporting Requirements*, Docket No. RSPA-98-3665, 64 Fed.Reg. 54474 (Oct. 6, 1999). The agency's ruling denying the State's request for a stay of the preemption decision pending judicial review is unpublished. The United States Department of Transportation's preemption decision and its ruling denying a stay are set forth at Appendix pages 83-125.

STATEMENT OF THE BASIS FOR JURISDICTION

The Sixth Circuit Court of Appeals entered judgment on April 23, 2003. No party sought rehearing. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and under the collateral order doctrine. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The sovereign immunity inherent in the United States Constitution that precludes the States from being subject to adjudicative proceedings commenced by private parties. *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); *Alden v. Maine*, 527 U.S. 706 (1999).

STATEMENT OF THE CASE

Tennessee's Hazardous Waste Remedial Action Fee

Respondent, the Association of Waste Hazardous Materials Transporters (AWHMT), is an association of companies that transport hazardous waste throughout the United States, including in Tennessee. App. at 98-99. In order to protect the health, safety, and welfare of its citizens, petitioner, the State of Tennessee, uses its police powers to regulate the "safe storage, ***transportation***, treatment and disposal of hazardous wastes." Tenn. Code Ann. § 68-212-102(1) (2001) (emphasis supplied). Any entity that seeks to transport hazardous waste to or from locations within the state must obtain a hazardous waste transporter permit from the Tennessee Department of Environment and Conservation (TDEC). Tenn. Code Ann. § 68-212-108(a) (2001).

Those issued a hazardous waste transporter permit are required to pay annually a $650 remedial action fee. Tenn. Code Ann. § 68-212-203(a)(6)(C) (2001); Tenn. Comp. R. & Regs., ch. 1200-1-13-.03(1)(e) (May 2003). App. at 136, 147. The members of AWHMT transporting hazardous waste to and from Tennessee are subject to the annual remedial action fee.

The remedial action fees collected are placed in the Tennessee Hazardous Waste Remedial Action Fund (the Fund), which is a special account separate from the State's general fund. Tenn. Code Ann. § 68-212-204 (2001). TDEC uses the Fund to investigate, contain, and clean up "inactive hazardous substance sites." Tenn. Code Ann. § 68-212-205 (2001). These are sites where "hazardous substance disposal has occurred." Tenn. Code Ann. § 68-212-202(3) (2001).

Hazardous substance is defined in Tennessee law as in federal law. Tenn. Code Ann. § 68-212-202(2) (2001); 42 U.S.C. § 9601(14) (1995). Hazardous wastes are a subset within the larger category of hazardous substances. A "disposal" occurs when there has been a release or threatened release of hazardous waste. Tenn. Code Ann. § 68-212-104 (2001). In the context of hazardous waste transportation, such a release or threatened release may occur as the result of an accident, or as the result of an illegal disposal by a transporter.

TDEC is authorized to use the monies in the Fund to retain contractors to perform investigative and corrective actions at inactive hazardous substance sites. Tenn. Code Ann. § 68-212-205(b) (2001). This includes emergency response. TDEC's emergency response contractor is available to address highway and/or rail incidents

involving the release or threatened release of hazardous waste during transport.

The Proceeding Before The United States Department Of Transportation

Under 49 U.S.C. § 5125(d)(1) of the Hazardous Materials Transportation Act (HMTA), a private party with standing may file an application to commence a proceeding before respondent, the United States Department of Transportation (USDOT), to obtain a decision about whether a State's law is preempted by federal hazardous materials transportation law.[1] App. at 126. On March 23, 1998, AWHMT filed an application with USDOT asking the agency to rule that Tennessee's hazardous waste remedial action fee and its written incident notification requirement are preempted. App. at 91. Under USDOT's regulations, a "hazardous material" specifically includes hazardous wastes. 49 C.F.R. § 171.8 (2002).

AWHMT served by mail a copy of its application for preemption upon Tennessee, accompanied by the required statement informing the State that it may submit to USDOT a response to the application. 49 C.F.R. § 107.205(a) (2002). The State submitted response and rebuttal comments to USDOT. AWHMT also submitted rebuttal comments.

[1] Authority to render preemption decisions under § 5125(d)(1) has been delegated by the USDOT Secretary to the Associate Administrator for Hazardous Materials Safety in the agency's Research and Special Programs Administration. App. at 96.

USDOT published notice of the AWHMT application in the Federal Register, and invited comment. App. at 93. In response to the notice, USDOT received comments on the application from the Association of American Railroads and the Hazardous Materials Advisory Council. *Id.*

On October 6, 1999, USDOT published in the Federal Register its decision on the AWHMT application. *Preemption Determination No. 21(R), Tennessee Hazardous Waste Transporter Fee and Reporting Requirements*, 64 Fed.Reg. 54474 (Oct. 6, 1999). App. at 90-125. In its decision, USDOT ruled that Tennessee's remedial action fee law is preempted under HMTA § 5125(g)(1), which requires state fees to be "fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response."[2] 49 U.S.C. § 5125(g)(1) (1997). App. at 112, 117.

Applying a Commerce Clause taxation analysis, USDOT held that Tennessee's remedial action fee is not "fair" under § 5125(g)(1), because it is not apportioned based upon a transporter's "use of roads or other facilities within the State. . . . " App. at 109. USDOT also held that Tennessee's remedial action fees have not been used to maintain a "capability for emergency response" because the fees already collected have not been completely

[2] USDOT also ruled that Tennessee's written notification requirement is preempted. App. at 123. In its comments in response to the application, while the State contested AWHMT's preemption claims regarding the remedial action fee, it conceded that the notification requirement is preempted. Thus, the State did not seek judicial review of this aspect of USDOT's preemption ruling.

expended by the State, or segregated into a fund separate from the remedial action fees paid by others involved in hazardous waste management in Tennessee. App. at 116-17.

In accordance with 5 U.S.C. § 705 (1996), the State asked USDOT to stay the effectiveness of its preemption decision, particularly in light of the sovereign immunity decision that had just been rendered by this Court in *Alden v. Maine*, 527 U.S. 706 (1999). USDOT denied the stay request. App. at 83-89.

Proceedings In The District Court

On December 3, 1999, Tennessee filed a petition for judicial review of USDOT's decision that the State's remedial action fee law is preempted. In accordance with a case management order, the parties filed cross motions for judgment on the administrative record. The district court referred the cross motions to a magistrate judge for a report and recommendation for disposition.

In a November 9, 2000 report and recommendation, the magistrate judge determined that the "doctrine of sovereign immunity bars the administrative proceeding at issue in this case." App. at 81. The magistrate judge concluded that *Alden* establishes that Congress is without authority under Article I of the United States Constitution to submit Tennessee to the private cause of action established in HMTA § 5125(d)(1), regardless of whether that

action is adjudicated in a federal court, a state court, or an administrative tribunal.[3] App. at 79.

USDOT and AWHMT filed motions for a *de novo* determination of the sovereign immunity issue by the district court, and objections to the report and recommendation. On February 27, 2001, the district court rejected the report and recommendation and the State's claim of sovereign immunity. App. at 18-22. The court held that the immunity issue is governed by the decision in *Tennessee Dept. of Human Services v. U.S. Dept. of Education*, 979 F.2d 1162 (6th Cir. 1992). App. at 20-21. In *Tennessee Dept. of Human Services*, the Sixth Circuit held that state sovereign immunity only applies to adjudication by the Article III federal courts, and does not apply to non-Article III tribunals such as "executive branch adjudicatory bodies." 979 F.2d at 1166.

On March 16, 2001, the State filed a notice of appeal of the district court's sovereign immunity ruling under the collateral order doctrine. And on March 21, 2001, the district court, *sua sponte*, entered an order staying further proceedings pending resolution of the appeal.

The Sixth Circuit Court of Appeals' Decision

The Sixth Circuit affirmed the district court's sovereign immunity decision but on different grounds.[4] The

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[3] Because of the magistrate judge's decision on the sovereign immunity issue, he did not reach the other issues in this matter.

[4] Before the Sixth Circuit, the parties consented to the submission of an *amicus curiae* brief in support of USDOT and AWHMT by several industry associations.

appeals court did recognize that in light of *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), "the district court's analysis in this case, which rejected Tennessee's claim of sovereign immunity merely on the basis that the USDOT proceeding is administrative in nature, is no longer complete." *Tennessee v. U.S. Dept. of Transportation*, 326 F.3d 729, 734 (6th Cir. 2003). App. at 1-16. Nevertheless, the Sixth Circuit denied the State's sovereign immunity claim, holding that a HMTA § 5125(d)(1) proceeding is not an "'adjudication' as that term was used by" this Court in *Federal Maritime Comm'n*. 326 F.3d at 734. App. at 12.

A § 5125(d)(1) proceeding is different, according to the Sixth Circuit, because USDOT "is not required to hold a hearing, and if a hearing is conducted, it is not bound by the rules of evidence or civil procedure, nor is it handled by an administrative law judge." 326 F.3d at 735. App. at 13. In addition, the court noted that USDOT's preemption decision does not provide for "injunctive relief" or "an award of monetary damages" against the State. 326 F.3d at 736. App. at 14-15. The Sixth Circuit concluded that a § 5125(d)(1) proceeding is actually rulemaking under the Administrative Procedure Act. 326 F.3d at 734-35. App. at 12-13.

REASONS FOR GRANTING THE WRIT

"The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities." *Federal Maritime Comm'n*, 535 U.S. at 760. In denying Tennessee's claim of immunity, the Sixth Circuit has decided an important federal

question in a way that conflicts with this Court's decisions in *Alden* and *Federal Maritime Comm'n*.

Congress clearly intended a § 5125(d)(1) proceeding to be adjudicative, and the preemption decision rendered by USDOT to be binding on a State. *Alden* establishes that state sovereign immunity is not limited to adjudication before Article III tribunals. And *Federal Maritime Comm'n* holds that sovereign immunity bars formal agency adjudication of private claims against a State.

Although a § 5125(d)(1) proceeding is structured as informal rather than formal agency adjudication under the Administrative Procedure Act, it contains the essential elements of an adjudicative proceeding identified by this Court in *Federal Maritime Comm'n*. Accepting the notion that sovereign immunity does not apply to an informal adjudicative proceeding, such as the one commenced under § 5125(d)(1), means that Congress could authorize a federal agency to informally adjudicate private claims against a State under the Fair Labor Standards Act and the Shipping Act, and then render a decision that is binding on the State. That result would squarely conflict with this Court's decisions in *Alden* and *Federal Maritime Comm'n*.

There is no principled constitutional basis for concluding that state sovereign immunity attaches to formal adjudication but does not attach at all to informal adjudication. Such immunity becomes merely illusory if Congress can exercise its Article I powers, as it has done in § 5125(d)(1), to authorize a federal agency, at the instance of a private party, to render through informal adjudication a binding decision that a State's law is preempted.

Congress Intended A § 5125(d)(1) Proceeding To Be Adjudicative And USDOT's Preemption Decision To Be Binding On The State.

In HMTA § 5125(d)(1), Congress provided that a private party "***directly affected*** by a requirement of a State . . . may apply to the [USDOT] Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted. . . . The Secretary ***shall issue a decision*** on an application for a determination. . . . " 49 U.S.C. § 5125(d)(1) (1997) (emphasis supplied). "A party to a proceeding under subsection (d) . . . [may seek] judicial review of the decision of the Secretary not later than 60 days after the decision becomes final." 49 U.S.C. § 5125(f) (1997).

Congress created the § 5125(d)(1) preemption proceeding in the 1990 HMTA amendments. *See* Hazardous Materials Transportation Uniform Safety Act of 1990, Pub. L. 101-615, § 13, 104 Stat. 3244, 3260 (1990). In the same amendments, Congress also provided that "instead of applying to the Secretary," a party directly affected by a State requirement may seek "a decision on preemption from a court of competent jurisdiction." 49 U.S.C. § 5125(d)(3) (1997).

Agency adjudication under § 5125(d)(1) was intended by Congress to be an alternative to a judicial preemption suit against a State under § 5125(d)(3). As reflected in the legislative history of the 1990 amendments, Congress intended that "[p]arties may either file with the [USDOT] Secretary or go to court, but not both." H.R. Rep. No. 101-444(I), 101st Cong., 2nd Sess. (1990), at 28, 1990 WL 259162.

Congress also intended USDOT's preemption decision under § 5125(d)(1) to be binding on a State. Prior to the 1990 HMTA amendments, USDOT had been rendering what the agency called "inconsistency rulings." These rulings were "advisory opinion[s]" rendered by USDOT as to whether a particular state or local law was preempted by federal hazardous materials transportation law. *Colorado Public Utilities Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

The legislative history of the 1990 HMTA amendments shows that Congress recognized that USDOT's inconsistency rulings were "advisory in nature and ha[d] no binding effect on either States or political subdivisions thereof." H.R. Rep. No. 101-444(I), 101st Cong., 2nd Sess. (1990), at 52, 1990 WL 259162. With the 1990 amendments, Congress replaced "the inconsistency ruling process with a binding administrative process for determining whether State or local requirements are preempted." *Id.* at 28.

Congress intended a § 5125(d)(1) proceeding to be adjudicative, and such proceedings are structured to function as such. In the absence of a proper application filed by a third party, USDOT has no authority under § 5125(d)(1) to decide if state law is preempted, just as a court has no authority to render a preemption decision under § 5125(d)(3) in the absence of a properly filed complaint. A party seeking to file an application for a USDOT preemption decision must have standing, *i.e.*, it must be "directly affected by a requirement of a State." 49 U.S.C. § 5125(d)(1) (1997). *See also* 49 C.F.R. § 107.203(a)(5) (2002).

An application to commence a § 5125(d)(1) proceeding must contain allegations of law and fact explaining why a State's law should be held to be preempted. 49 C.F.R. § 107.203(a)(4) (2002). The filing party must serve a copy of the application by mail upon the State whose requirement is being challenged, accompanied by a statement notifying the State that it may submit to USDOT a response to the application. 49 C.F.R. § 107.205(a) (2002). The party must certify in the preemption application filed with USDOT that it has sent a copy of the application to the State and include the name and address of the State official to whom the application was sent. *Id.*

Under certain circumstances, USDOT "may dismiss the application without prejudice." 49 C.F.R. § 107.207(b) (2002). But otherwise, Congress has mandated that USDOT "shall issue a decision on an application." 49 U.S.C. § 5125(d)(1) (1997). USDOT's decision is based "[u]pon consideration of the application and other relevant information received." 49 C.F.R. § 107.209(a) (2002). And just as a court rendering a decision makes findings of fact and conclusions of law, USDOT's decision must set out "the relevant facts and the legal basis for the determination." 49 C.F.R. § 107.209(b) (2002).

As in a judicial proceeding, an "aggrieved" party may timely petition USDOT for reconsideration of the agency's decision. 49 C.F.R. § 107.211 (2002). Once USDOT's decision becomes final, a "party to the proceeding" may seek judicial review of the decision. 49 U.S.C. § 5125(f) (1997); 49 C.F.R. § 107.213 (2002).

Sovereign Immunity Bars Informal Adjudication By USDOT Of A Private Party's Claim That A State's Law Is Preempted.

The States' immunity under the federal constitution extends to the adjudication of private claims before Article I tribunals. This immunity bars adjudication by USDOT under § 5125(d)(1) of a private party's claim that a State's law is preempted.

Although a § 5125(d)(1) proceeding is structured as informal, rather than formal agency adjudication, it contains the essential elements of an adjudicative proceeding as identified by this Court in *Federal Maritime Comm'n*. Thus, it is the type of proceeding from which the constitutional framers would have thought the States possessed immunity when they agreed to enter the Union.

In *Alden*, this Court held that sovereign immunity bars state court adjudication of private federal law claims against a State. *Alden* makes clear that the sovereign immunity enjoyed by the States under the federal constitution neither derives from nor is limited by the Eleventh Amendment and its restrictions on the Article III federal courts. 527 U.S. at 713. Such immunity was implicit in the fundamental postulates underlying the original constitutional design:

> [A]s the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other

> States) except as altered by the plan of the Convention or certain constitutional Amendments.

Id. The States retained sovereign immunity except to the extent they were required to surrender this power to Congress. "This ***separate and distinct structural principle*** is not directly related to the scope of the judicial power established by Article III, but inheres in the system of federalism established by the Constitution." *Id.* (emphasis supplied).

Thus, *Alden* establishes that state sovereign immunity applies to the adjudication of private claims before non-Article III tribunals. Following *Alden*, the Court in *Federal Maritime Comm'n* considered whether state sovereign immunity barred a federal agency – the Federal Maritime Commission (FMC) – from adjudicating a private party's complaint that South Carolina had violated the Shipping Act of 1984. 535 U.S. at 747. The States could not have consented to such an action in ratifying the Constitution given "the fact that States were not subject to private suits in administrative adjudications at the time of the founding or for many years thereafter." *Id.* at 755.

The Court examined the FMC adjudications "to determine if they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." *Id.* at 756. The Court concluded that FMC adjudications are such proceedings because they "bear a remarkably strong resemblance to civil litigation in federal courts." *Id.* at 757.

Although there are differences between a FMC adjudication and a USDOT adjudication under § 5125(d)(1), both share the essential elements identified by the Court

in *Federal Maritime Comm'n*. HMTA § 5125(d)(1) proceedings "are adversary in nature." *Id.* (citation omitted). As noted, a § 5125(d)(1) proceeding may only be commenced upon the filing of a proper preemption application by a third party with standing.[5] *See* 49 U.S.C. § 5125(d)(1) (1997); 49 C.F.R. § 107.203 (2002).

The preemption determination is rendered by a federal officer who exercises "independent judgment."[6] 535 U.S. at 756 (citation omitted). Parties are entitled to present their arguments by "documentary evidence." *Id.* at 757 (citation omitted). *See* 49 C.F.R. § 107.205 (2002). The information received by USDOT during a § 5125(d)(1) proceeding "constitutes the exclusive record for the decision." 535 U.S. at 757 (citation omitted). *See* 49 C.F.R. § 107.209(a) (2002). And the "parties are entitled to know the findings and conclusions on all issues of fact, law or discretion presented on the record." 535 U.S. at 757 (citation omitted). *See* 49 C.F.R. § 107.209(a) and (b) (2002).

Federal agency adjudication may be formal or informal. *See, e.g., Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990) ("[t]he determination in this case, however, was lawfully made by informal adjudication"). The main difference between the administrative proceeding considered in *Federal Maritime Comm'n* and a § 5125(d)(1) preemption proceeding is that the FMC

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[5] USDOT acknowledges that only a party with standing may file a preemption application. App. at 98-99.

[6] USDOT only functions as an adjudicator under § 5125(d)(1). There is no provision authorizing the agency to participate as a party/litigant in a § 5125(d)(1) proceeding.

proceeding is formal adjudication and the USDOT proceeding is informal adjudication.

Formal adjudication is mandated by the Administrative Procedure Act (APA) when agency adjudication is "required by statute to be determined on the record after opportunity for an agency hearing. . . . " 5 U.S.C. § 554(a) (1996). Under the Shipping Act, the FMC rendered a decision "after notice and hearing. . . . "[7] *Federal Maritime Comm'n*, 535 U.S. at 749, n. 5.

A hearing is more likely to be required by statute when the issues to be adjudicated by the agency are fact intensive. And as a result, formal adjudication, like the agency proceeding in *Federal Maritime Comm'n*, necessitates the use of more elaborate practice and procedural provisions. *See* 535 U.S. at 757-58.

In § 5125(d)(1), Congress did not require an agency hearing because a preemption adjudication does not require extensive factual development. The issue of whether a State's law is preempted is primarily a question of law, not fact, requiring the application of legal principles established by this Court's jurisprudence.

Under § 5125(d)(1), USDOT's preemption decision is a declaratory determination. The declaratory ruling that results from a § 5125(d)(1) proceeding is comparable to a declaratory judgment in a court of law. Declaratory proceedings in general are inappropriate for issues requiring

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[7] While it is not required by statute, USDOT may "convene a hearing" if it will advance the agency's evaluation of a preemption application. 49 C.F.R. § 107.207(a) (2002).

extensive factual development. *See, e.g., Allstate Insurance Co. v. Phillip Leasing Co.*, 214 F.Supp. 273, 276 (W.D. S.D. 1963) (" '[o]rdinarily, a declaratory judgment will be refused where to render same requires a judicial investigation of disputed facts").

A HMTA § 5125(d)(1) proceeding is the administrative counterpart to the proceeding established by Congress in § 5125(d)(3) whereby a private party may bring an action against a State in federal court seeking a declaratory ruling on preemption. A § 5125(d)(1) proceeding is the "type of proceeding[ ] from which the Framers would have thought the States possessed immunity when they agreed to enter the Union." *Federal Maritime Comm'n*, 535 U.S. at 756. As a result, state sovereign immunity bars USDOT from adjudicating AWHMT's claim that Tennessee's remedial action fee law is preempted.

The Sixth Circuit, however, reached the opposite conclusion. The appeals court held that a § 5125(d)(1) proceeding is not "adjudication" because it differs from a FMC proceeding in two ways the court considered significant. "The first concerns the character of the decision-maker. The second the nature of the decision." 326 F.3d at 735. App. at 14.

The Sixth Circuit noted that the decision-maker in a § 5125(d)(1) proceeding is not an administrative law judge (ALJ). The USDOT Secretary has delegated decision making authority in § 5125(d)(1) proceedings to an Associate Administrator. App. at 96. According to the appeals court, the Associate Administrator as "a member of the executive branch charged with the duty of furthering the purpose of the federal legislation at issue . . . need not

remain 'insulated from political influence.'" 326 F.3d at 735. App. at 14.

The critical test, however, is whether the administrative adjudicator acts impartially and exercises "independent judgment" in reaching a decision. *Federal Maritime Comm'n*, 535 U.S. at 756 (citation omitted). The Sixth Circuit's focus on the ALJ's role in a FMC adjudication ignores the fact that the final administrative decision-maker is not the ALJ, but rather the members of the Commission, who had, in fact, reversed the ALJ's ruling in that case. *See id.* at 750, 759.

When the case was before the Fourth Circuit Court of Appeals, it expressly recognized that although the FMC members are political appointees within the Executive Branch, in functioning as adjudicators, their actions are "impartial." *South Carolina State Ports Authority v. Federal Maritime Comm'n*, 243 F.3d 165, 174 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002). As stated by the appeals court, the "commissioners in the FMC independently judge the evidence before them." 243 F.3d at 174.

USDOT's Associate Administrator, as an agency official, is in a similar position to the members of the FMC. Neither USDOT nor any party in this matter has asserted that the Associate Administrator does not exercise independent judgment in reaching a preemption decision under § 5125(d)(1).

If USDOT precluded the Associate Administrator from exercising independent judgment, it would render the entire process unconstitutional. The basic due process requirement of an impartial tribunal "applies to administrative agencies which adjudicate as well as to courts." *Witherow v. Larken*, 421 U.S. 35, 46 (1975). A "biased

decisionmaker [is] constitutionally unacceptable. . . . " *Id.* at 47 (citations omitted).

There is, however, "a presumption of honesty and integrity in those serving as adjudicators. . . . " *Id.* And that presumption controls here. Because USDOT's Associate Administrator exercises independent judgment in making a preemption determination, he serves as an impartial decision-maker.

There is, moreover, nothing in § 5125(d)(1) that would preclude the USDOT Secretary from delegating the authority to render preemption decisions to an ALJ, should he choose to do so. It strains credibility to suggest that this change in delegation from a USDOT official to an ALJ would transform a § 5125(d)(1) proceeding from one not barred by sovereign immunity to one that is. This would be particularly ironic given that it is within the USDOT Secretary's authority to determine who will rule on preemption applications.

In concluding that a § 5125(d)(1) proceeding is not adjudication, the Sixth Circuit also found the "nature of the final determination" significant. 326 F.3d at 736. App. at 14. The court noted that USDOT's decision does not provide for "injunctive relief" or "an award of monetary damages" against the State. 326 F.3d at 736. App. at 14-15.

But "the type of relief sought is irrelevant to whether Congress has the power to abrogate States' immunity." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). As stated by this Court in *Federal Maritime Comm'n*, sovereign immunity would bar a private action against a State even if in authorizing the action Congress

precluded the tribunal from awarding "any relief." 535 U.S. at 766.

The "nature of the final determination" in a § 5125(d)(1) proceeding is declaratory. As discussed, *supra*, it is the administrative counterpart to a judicial declaratory judgment. Here, AWHMT did in fact receive the relief it sought, which was a declaratory determination by USDOT, binding on Tennessee, that the State's remedial action fee is preempted and thus unconstitutional under the Supremacy Clause. This is a fee that AWHMT's members did not want to pay. And since USDOT's decision, the State has not sought to collect the fee from transporters.

While the Sixth Circuit did not think a § 5125(d)(1) proceeding was adjudication, it did conclude that "the procedure fits within the informal rule-making process outlined in the [APA]." 326 F.3d at 734 (citation omitted). App. at 12. But a § 5125(d)(1) proceeding is not rulemaking.

USDOT's preemption determination cannot be accurately characterized as a "rule" because it defines and limits Tennessee's remedial action fee by requiring that fee to be apportioned. In the HMTA, Congress has expressly denied USDOT authority to promulgate any "rule" that would "define or limit the amount of a fee a State may impose or collect." 49 U.S.C. § 5119(c) (1997).

A § 5125(d)(1) proceeding does not, moreover, have the hallmarks of an APA rulemaking. Two principle characteristics distinguish adjudication from rulemaking:

> First, adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals. . . . Second, because

> adjudications involve concrete disputes, they have an immediate effect on specific individuals (those involved in the dispute). Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule is applied.

Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994) (citations omitted).

Applying these principles here confirms that a § 5125(d)(1) proceeding is adjudication, not rulemaking. In response to AWHMT's application, USDOT addressed a concrete dispute – the preemption of Tennessee law – between specific entities, AWHMT and the State. And because USDOT's decision is binding on the State as a party to the proceeding, it has an immediate effect.[8]

A § 5125(d)(1) proceeding does fit cleanly within the definition of "adjudication" in the APA, which is the "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1996). An "order" is defined as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or ***declaratory*** in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6) (1996) (emphasis supplied). USDOT's preemption decision is best viewed under the APA as an "order" not a "rule" because it serves as a final disposition,

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[8] Because a § 5125(d)(1) proceeding does not have the characteristics of a rulemaking, USDOT's preemption decision does not fit naturally within the APA's definition of a "rule," which is "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . . " 5 U.S.C. § 551(4) (1996).

declaratory in form, of the proceeding commenced by a third party's filing of a preemption application.

The Sixth Circuit found a § 5125(d)(1) proceeding consistent with APA rulemaking because the agency provides public notice and invites comment. 326 F.3d at 734-35. App. at 12-13. But the public notice and comment that occurs in connection with rulemaking under the APA is not the same as in a § 5125(d)(1) proceeding.

In rulemaking, the public has notice of and an opportunity to comment on the ***agency's views*** regarding its proposed rule. Under § 5125(d)(1), USDOT publishes a summary of the applicant's preemption application. 49 C.F.R. § 107.205(b) (2002). Thus, the public has notice of and an opportunity to comment on the ***applicant's views***, but not USDOT's, about why the state law in issue is preempted.

USDOT's view of preemption is first expressed when it publishes its decision in the Federal Register. And at that point only a party "aggrieved" by USDOT's decision may petition the agency to reconsider. 49 C.F.R. § 107.211 (2002).

The Sixth Circuit also found § 5125(d)(1) consistent with rulemaking because under APA § 553(e) private parties may petition an agency to promulgate a rule. 326 F.3d at 736. App. at 12. *See* 5 U.S.C. § 553(e) (1996). The appeals court viewed this as comparable to an application for a preemption determination under § 5125(d)(1). 326 F.3d at 736. App. at 12.

But a § 553(e) petition differs from a § 5125(d)(1) application in at least three significant ways. First, a § 553(e) petition is not the ***only*** means by which an agency

may initiate rulemaking. A federal agency with the delegated power to promulgate rules has the authority to commence a rulemaking proceeding on its own initiative. But USDOT has no authority to commence a § 5125(d)(1) proceeding. This proceeding may only be commenced by a third party filing a proper preemption application.

Second, APA § 553(e) does not require the petitioning party to have standing, as does § 5125(d)(1).[9] Third, an agency is not required to initiate rulemaking upon receipt of a § 553(e) petition. But under § 5125(d)(1), when USDOT receives a proper application, Congress has mandated that the agency "***shall*** issue a decision."[10] 49 U.S.C. § 5125(d)(1) (1997) (emphasis supplied).

Finally, the Sixth Circuit found a § 5125(d)(1) proceeding to be consistent with APA rulemaking because the State "is in no way required to participate in the determination. . . . "[11] 326 F.3d at 735. App. at 13. The appeals

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[9] Section 5125(d)(1) uses language associated with adjudication, not rulemaking. Only a party "directly affected" by a State's law may file a preemption application. 49 U.S.C. § 5125(d)(1) (1997). In contrast, any "interested" party may petition for a rule. 5 U.S.C. § 553(e) (1996). In the same vein, an interested party may petition an agency to reconsider its rule. *See* 326 F.3d at 736. App. at 16. But only an "aggrieved" party may petition USDOT to reconsider its preemption decision.

[10] This congressional mandate further establishes that § 5125(d)(1) was intended to be adjudicative. *Cf. Federal Maritime Comm'n*, 535 U.S. at 764 (the FMC does not "have the discretion to refuse to adjudicate complaints brought by private parties").

[11] This conclusion ignores the fact that after receiving AWHMT's application USDOT "asked Tennessee to set forth in detail [in its response comments] how much it collected [in remedial action fees] and how it used the fees it collected in fiscal year 1996-97." App. at 116.

court held that even if the State chooses not to participate, it is not barred from seeking judicial review of USDOT's decision. 736 F.3d at 735. App. at 13.

But there are both legal and practical reasons why a State must actively participate in a § 5125(d)(1) proceeding. As this Court reiterated in *Federal Maritime Comm'n*, as a legal matter, if a State "fails to appear before the [agency], it may not then argue the merits of its position in an appeal of the [agency's] determination. . . . " 535 U.S. at 762 (citation omitted).

The State also is prejudiced if it allows USDOT's preemption decision to become final without seeking judicial review. In any subsequent action, the State's failure to pursue its administrative remedy precludes it "from raising in court the merits of [its] claim or defenses which could have been entertained administratively in the first instance."[12] *Ulman v. United States*, 558 F.2d 1 (Cl. Ct. 1977).

There also are practical reasons why a State must participate in a § 5125(d)(1) proceeding. A private party's decision to file an application asking USDOT to determine that a State's law is preempted produces "practical pressures upon the State to respond and eventually to comply

[12] The Sixth Circuit also concluded that the State is not at risk for a civil penalty assessment for non-compliance with USDOT's preemption determination because "the agency is without authority to issue an order against the state." 326 F.3d at 736. App. at 15. But the appeals court failed to take into consideration that USDOT's preemption decision falls within the definition of an "order" under the APA. And the HMTA expressly authorizes USDOT to seek penalties for violation of "an order issued under this chapter. . . . " 49 U.S.C. § 5123(a)(1) (1997).

with a [USDOT] decision. . . . [B]y complying, the State will avoid the adverse political, practical, and symbolic implications of being labeled a federal 'lawbreaker.'" *Federal Maritime Comm'n*, 535 U.S. at 783 (Breyer, J., dissenting).

These legal and practical considerations are exemplified here. The State had no choice but to respond to AWHMT's application asking USDOT to determine that Tennessee's remedial action fee is preempted. The State had to raise and preserve its merits arguments about why the fee is not preempted. But once USDOT ruled in favor of AWHMT, the State, even in the absence of an injunction, ceased efforts to collect the fee from transporters while pursing judicial review of the agency's decision.

The Sixth Circuit's ruling that state sovereign immunity is inapplicable to a § 5125(d)(1) proceeding conflicts with the rulings of this Court in *Alden* and *Federal Maritime Comm'n*. Congress clearly intended a § 5125(d)(1) proceeding to be adjudicative, and USDOT's preemption decision to be binding on the State. Although a § 5125(d)(1) proceeding is informal rather than formal adjudication under the APA, it bears all the essential elements of an adjudicative proceeding. Congress exceeded its Article I powers in subjecting the States to private preemption claims under § 5125(d)(1). And as a result, USDOT is barred from adjudicating AWHMT's claim that Tennessee's remedial action fee is preempted.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

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File Name: 03a0120p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

State of Tennessee and Tennessee Department of Environment and Conservation,

Plaintiffs-Appellants,

v.

United States Department of Transportation, Research and Special Programs Administration, and Association of Waste Hazardous Materials Transporters,

Defendants-Appellees.

No. 01-5373

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. No. 99-01126 – Todd J. Campbell, District Judge.

Argued: September 17, 2002

Decided and Filed: April 23, 2003

Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Barry Turner, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellants. Michael S. Raab, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees. **ON BRIEF:** Barry Turner, OFFICE OF THE ATTORNEY GENERAL, Nashville, Tennessee, for Appellants. Michael S. Raab, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Frazer C. Hilder, UNITED STATES DEPARTMENT OF TRANSPORTATION, RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION, Washington, D.C., Peter J. Plocki, UNITED STATES DEPARTMENT OF TRANSPORTATION, OFFICE OF THE GENERAL COUNSEL, Washington, D.C., Grant C. Glassford, James E. Gaylord, STOKES, BARTHOLOMEW, EVANS & PETREE, Nashville, Tennessee, for Appellees. Lawrence W. Bierlein, McCARTHY, SWEENEY & HARKAWAY, Washington, D.C., for Amici Curiae.

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge. In this appeal, the State of Tennessee and the Tennessee Department of Environment and Conservation challenge the district court's decision upholding the United States Department of Transportation's disallowance of an annual fee imposed by Tennessee on interstate hazardous waste transporters under the Tennessee Hazardous Waste Management Act, Tenn.Code Ann. § 68-212-203(a)(6). The district court held that the state statute authorizing the fee is preempted by the federal Hazardous Materials

Transportation Act, 49 U.S.C. §§ 5101 *et seq.* In response to the claim that the federal agency's action was barred by sovereign immunity, the district court also held that the determination by the United States Department of Transportation (the USDOT) was an "executive administrative action" that was not subject to either (1) the doctrine of state sovereign immunity imbedded in [sic] Eleventh Amendment, *see Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996), or (2) that version of *extra*-constitutional immunity doctrine lately recognized by the United States Supreme Court in *Alden v. Maine,* 527 U.S. 706 (1999). After judgment in the federal agency's favor was entered below, the Supreme Court announced its decision in *Federal Maritime Commission v. South Carolina State Ports Authority,* 535 U.S. 743, 122 S. Ct. 1864 (2002), holding that the State of South Carolina was immune from a complaint by a private party because the agency "adjudication" used to resolve the complaint administratively "walked, talked, and squawked" like a lawsuit. *Id.* at ___, 122 S. Ct. at 1873. Hence, our task in this case is to determine whether the agency determination made by the USDOT meets the "walk, talk, and squawk test" of *Federal Maritime Commission.* If so, the State of Tennessee would be immune from the proceedings instituted in this case, and the district court's judgment would necessarily have to be reversed.

For the reasons set out below, we conclude that reversal in this case is not warranted, and we therefore affirm the judgment of the district court.

BACKGROUND

In 1975, Congress passed the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127, pursuant to the Commerce Clause in Article I of the United States Constitution. The stated intent of the Act is "to provide adequate protection against the risk to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 5101. In an effort to create a coherent approach to addressing the problems posed by the interstate transportation of hazardous material (known in the trade as "hazmat"), Congress vested central authority over "hazmat" regulation in the USDOT. Consistent with this centralization of authority, Congress determined that federal preemption of state and local laws inconsistent with the Act was necessary and, therefore, promulgated a section of the Act entirely devoted to preemption concerns. Section 5125(a) sets out the criteria for preemption:

> (a) General. Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if –
>
> > (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or

> (2) the requirement of the State, political subdivision, or tribe as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, or a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

49 U.S.C. § 5125(a).[1] Obviously, not all state requirements are preempted, and the procedure for determining whether preemption will apply to a particular state provision is found in subsection (d):

> (d)(1) A person (including a State, a political subdivision of a State or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a),(b)(1), or (c) of this section. The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional

[1] This opinion quotes the statute as it currently reads. Although it was amended on November 25, 2002, Pub. L. 107-296, as part of the Homeland Security Act of 2002, the changes do not affect the substantive analysis in this case.

> time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.
>
> (2) After consulting with States, political subdivisions of States, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.
>
> (3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

49 U.S.C. § 5125(d). The party seeking such a decision "may bring a civil action in an appropriate district court of the United States for judicial review of the decision of the Secretary" under § 5125(f).

When the subject of the preemption decision is the validity of a fee imposed by the state on "hazmat" transporters, as was the case here, § 5125(g) sets out the following test:

> A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

49 U.S.C. § 5125(g).

The implementing regulations of § 5125 provide that those who seek a preemption determination concerning a state "hazmat" requirement may apply to the Associate Administrator of the USDOT's Research and Special Programs Administration. *See* 49 C.F.R. § 107.203(a) and (b). The applicant must also serve a copy of the application on the state, notifying state officials of their right to submit comments regarding the application to the Associate Administrator. *See* 49 C.F.R. § 107.205(a). In addition, the Associate Administrator is required to publish notice of the application in the Federal Register, inviting comments. *See* 49 C.F.R. § 107.205(b). All parties submitting comments are required to provide those comments to the applicant as well, providing notice of service to the Associate Administrator. *See* 49 C.F.R. § 107.205(c). After receiving comments, the Associate Administrator is free to conduct an investigation and may or may not convene a hearing. *See* 49 C.F.R. § 107.207. Upon reaching a determination, the Administrator issues a written statement setting out relevant facts and law to all involved parties. The determination is subject to reconsideration upon the motion of a party. Thereafter it is placed on file in the public docket, printed in the Federal Register, and considered a final agency determination on the disputed question of preemption. *See* 49 C.F.R. § 107.209. Within 60 days of publication, the parties are free to seek judicial review of the determination in a federal district court. *See* 49 U.S.C. § 5125(f); 49 C.F.R. § 107.213.

In this case, the Association of Waste Hazardous Materials Transporters filed an application with the Associate Administrator in March 1998, seeking a preemption determination pursuant to § 5125(d). The Association

challenged the validity of TENN. CODE ANN. § 68-212-203(a)(6), a provision of the Tennessee Hazardous Waste Management Act that levies a flat $650 annual fee on all persons issued hazardous waste transportation permits by the state. The Association's application was served upon both state officials and the USDOT Administrator and printed in the Federal Register, giving interested parties notice and an invitation to submit comments. *See* 63 Fed. Reg. 17479 (April 9, 1998). After the submission of comments by the state and rebuttal comments by the Association, the Associate Administrator issued a decision in favor of the Association, concluding that the state law provision was preempted by federal law. *See* 64 Fed. Reg. 54474 (Oct. 6, 1999). In reaching the decision, the Administrator concluded that the fee met neither of the requirements of § 5125(g), finding that it was not fair and was not used for purposes consistent with the mandate of the federal Act.

As a result, the state filed a petition in federal district court seeking judicial review of the preemption determination. Relying on our holding in *Tennessee Department of Human Services v. United States Department of Education,* 979 F.2d 1162 (6th Cir. 1992), the district court held that Tennessee was not protected from purely administrative action by principles of sovereign immunity. The state now appeals that determination under the collateral order doctrine. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993).

ANALYSIS

Dual sovereignty, of course, lies at the center of the American constitutional structure. In ratifying the federal Constitution, the states surrendered a portion of their

inherent immunity and consented to suits brought both by sister states and by the federal government. *See Alden,* 527 U.S. at 755. However, the states, as political sovereigns, remained immune to private suit, provided that they had not given prior consent or otherwise waived immunity. *See, e.g., Port Auth. Trans-Hudson Corp. v. Feeney,* 495 U.S. 299, 304 (1990). Immunity to private suit is not limitless; through later ratification of the Fourteenth Amendment, the states waived immunity to suits brought pursuant to the congressional enforcement power granted by Section Five of that Amendment. *See Dellmuth v. Muth,* 491 U.S. 223, 227-28 (1989) (explaining that Congress has the authority to abrogate state sovereign immunity under Section Five of the Fourteenth Amendment when the intent to abrogate is clearly stated in the congressional act).

Passed in reaction to the Supreme Court decision in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793), the Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Until recently, the Eleventh Amendment was considered the primary source of state sovereignty, popularizing the shorthand term "11th Amendment sovereign immunity" as a general reference to inherent state power. However, recent Supreme Court analysis has provided that "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden,* 527 U.S. at 712; *see also Fed. Mar. Comm'n,* 535 U.S. at ___, 122 S. Ct. at 1871 (stating "the Eleventh

Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity"). Based upon interpretations of this inherent power, the Supreme Court has held that states are immune to private suits for violation of federal laws enacted under Congress's Article I powers not only in Article III courts, but also in state courts. *See Seminole Tribe,* 517 U.S. at 47 (immunity in federal courts); *Alden,* 527 U.S. at 712 (immunity in state courts). In addition, states may not be subjected to binding administrative adjudications brought by private parties unless prior consent to such proceedings has been given. *See Fed. Mar. Comm'n,* 535 U.S. at ___, 122 S. Ct. at 1874.

The central question in this case thus becomes whether the process of preemption determination established by Congress and carried out by the USDOT falls within the ambit of adjudicatory determinations barred by state sovereign immunity, as delineated in *Federal Maritime Commission.* There, the Court held that sovereign immunity protected a state agency from suit by a private party seeking injunctive relief and monetary damages for violation of the Shipping Act of 1984, 46 U.S.C. App. § 1710(a), which is enforced by the Federal Maritime Commission. 535 U.S. at ___, 122 S. Ct. at 1874. In the event of a complaint, the Shipping Act utilizes an administrative proceeding before an administrative law judge, governed by the Commission's Rules of Practice and Procedure, which the Court characterized as "quite similar to those found in the Federal Rules of Civil Procedure." *Id.* at ___, 122 S. Ct. at 1873. After cataloging the procedures provided by the Commission's rules, describing the role of the administrative law judge, and analyzing the nature of the available remedies, the Court concluded that "the

similarities between F[ederal] M[aritime] C[ommission] proceedings and civil litigation are overwhelming." *Id.* at ___, 122 S. Ct. at 1874. The Court reiterated the lower court's characterization of the Commission's administrative proceeding as one that "walks, talks, and squawks very much like a lawsuit" and concluded that, like Article III actions, the proceedings were adjudicative in nature and were therefore barred by sovereign immunity in actions against the state. *Id.* at ___, 122 S. Ct. at 1873-1877.

Hence, *Federal Maritime Commission* makes it clear that the district court's analysis in this case, which rejected Tennessee's claim of sovereign immunity merely on the basis that the USDOT proceeding was administrative in nature, is no longer complete. *See Tenn. v. U.S. Dep't of Transp.,* Order No. 3:99-1126 (M.D. Tenn. Feb. 27, 2001) (relying on *Tenn. Dep't of Human Servs. v. U.S. Dep't of Educ.,* 979 F.2d 1162 (6th Cir. 1992), in determining that "Eleventh Amendment immunity does not apply to Federal executive administrative action"). It falls to us to determine, based on the record developed below, whether the nature of the procedure used by the USDOT to respond to requests for preemption determinations under the Hazardous Materials Transportation Act is sufficiently "adjudicative" to fall under the rubric of the majority opinion in *Federal Maritime Commission.* In doing so, we must be mindful that it is also the duty and prerogative of administrative agencies in the executive branch of our constitutionally tripartite form of government to enforce federal law and to enact regulations necessary to that enforcement. *See, e.g., Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984).

We conclude that the facts in the record clearly distinguish this case from *Federal Maritime Commission* because the process used by the USDOT simply is not an "adjudication," as that term was used by the majority in the Supreme Court decision.

The structure of the preemption determination process detailed in 49 U.S.C. § 5125 is unique; the parties and the district court in this case were unable to identify any other congressional act employing a similar method. The process appears to be designed to meet two distinct goals: first, to allow the USDOT to interpret provisions of state law in conjunction with its understanding of the purpose of the federal legislation that it administers and, second, to ensure that its determination is afforded the deference required by *Chevron* when reviewed by the courts. As a result, the Act mandates a procedure that approximates other administrative procedures already given judicial approval.

Although unique in its structure, the procedure fits within the informal rule-making process outlined in the Administrative Procedure Act. *See* 5 U.S.C. § 553. The APA provides for interested parties to "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e); *see* 49 C.F.R. § 106.10 (stating that the regulations are added, amended, or deleted pursuant to the informal rule-making procedures of the APA). Accordingly, preemption determinations are prompted by the application of "[a] person . . . directly affected" by the requirements of the state law in question, in this matter the Association of Waste Hazardous Materials Association. 49 U.S.C. § 5125(d). The USDOT Associate Administrator then publishes notice of the application in the federal register, inviting "interested

persons an opportunity to participate . . . through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(c); *see* 49 C.F.R. § 106.55; 49 C.F.R. § 107.205. The state is also mandatorily provided notice by the party seeking a ruling before any determination is reached by the Administrator. *See* 49 C.F.R. § 107.205; *see also* 63 Fed. Reg. 17,479 (Apr. 9, 1998) (public notice and invitation to comment in this case). Further, although the state is in no way required to participate in the determination, state officials are encouraged to submit comments that better help the administrator evaluate the position of the relevant state agency. Even if the state chooses not to participate, it is not barred from challenging the final determination in a federal district court. *See* 49 U.S.C. § 5125(f). As earlier noted, similar versions of this process of rule-making have gained approval by the courts because of the provision for notice and comment by interested parties, as well as the application of agency expertise in reaching a final outcome. *See generally Chevron,* 467 U.S. at 837.

This process differs dramatically from the one scrutinized by the Supreme Court in *Federal Maritime Commission* and, quite plainly, does not mirror federal civil litigation. There are no formal rules of practice or procedure, no formal complaint is required, there is no provision for an answer by the state, and there is no formal discovery process. An investigation, if initiated by the Associate Administrator, is not governed by formal discovery rules. The Administrator is not required to conduct a hearing, and if a hearing is conducted, it is not bound by the rules of evidence or civil procedure, nor is it handled by an administrative law judge. *See* 49 C.F.R. §§ 107.205-209. The resulting ruling is prospective only.

We find two of the points set out above dispositive. The first concerns the character of the decision-maker. The second concerns the nature of the decision.

In invalidating the administrative action in *Federal Maritime Commission,* the Supreme Court focused heavily upon the role of the administrative law judge, finding that an administrative law judge acts as the functional equivalent of an Article III judge. *See* 535 U.S. at ___, 122 S. Ct. at 1872-73. The Court noted that administrative law judges have absolute immunity from liability for their judicial acts and are triers of fact "insulated from political influence." *Id.* at ___, 122 S. Ct. at 1872 (relying on *Butz v. Economou,* 438 U.S. 478 (1978)). In contrast, the decision-maker in this action, the Associate Administrator for Hazardous Materials Safety, acting under authority delegated by the Secretary of Transportation, is a member of the executive branch charged with the duty of furthering the purpose of the federal legislation at issue. This official is not bound by rules of evidence or procedure and need not remain "insulated from political influence." Clearly, the Associate Administrator acts not as an Article III judge, virtually or functionally, but merely, as the title implies, as an administrator of a federal agency interpreting and enforcing federal legislation in reaching the preemption determination.

The other dispositive factor is one that clearly distinguishes the process used by the USDOT in making the preemption determination from the procedure used in *Federal Maritime Commission*: the nature of the final determination. Rather than an adjudication of the rights and responsibilities of different parties leading to injunctive relief and an award of monetary damages, the preemption decision in 49 U.S.C. § 5125 does not direct the

entry of relief against the State of Tennessee. Instead, it serves as an administrative interpretation of a federal statute, prospective only in its application and warranting *Chevron* deference in subsequent litigation. *See Chevron*, 467 U.S. at 834-44. The action of the Associate Administrator does not result in an order of enforcement against a state, nor does it leave a state defenseless in later litigation if the state chooses not to participate in the administrative proceeding. *See Fed. Mar. Comm'n*, 535 U.S. at ___, 122 S. Ct. at 1876 (explaining that procedures effectively coercing states into participating in Federal Maritime Commission proceedings influenced the Court's decision that sovereign immunity barred suit against the State of South Carolina). Further, in contrast to the powers of the Federal Maritime Commission under provisions of the Shipping Act, *see id.* at ___, 122 S. Ct. at 1877-78, the USDOT Administrator does not possess the power to assess a civil penalty for non-compliance because the agency is without authority to issue an order against the state. Instead, the Administrator is merely providing an agency interpretation of the federal law in question, and that interpretation is strictly prospective in nature.

One further point about the preemption procedures must be addressed. The procedures include an opportunity for a person aggrieved by a determination to file a petition for reconsideration with the Associate Administrator. *See* 49 C.F.R. § 107.211. The State of Tennessee argues that the petition for reconsideration functions as the equivalent of a legal appeal, differentiating this procedure from the standard rule-making process. We conclude, however, that the existence of an opportunity to petition for reconsideration does not alter the nature of the decision reached by

the USDOT. Indeed, administrative agencies often entertain petitions for reconsideration in connection with the rule-making proceedings. *See, e.g., Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1003 (6th Cir. 1995); *Chrysler Corp. v. Dep't. of Transp.*, 472 F.2d 659, 680 (6th Cir. 1972).

CONCLUSION

For the reasons set out above, we conclude that the administrative procedure addressed in this matter falls within the rule-making process lying at the center of the responsibilities of federal executive agencies. Rather than an adjudicative procedure, the process utilized to reach a preemption determination serves the valuable function of allowing an agency of the executive branch to interpret federal legislation that it is authorized to enforce. This procedure, employing a notice-and-comment process and the expertise of the USDOT, does not offend the dignity of the states, nor does it force a state to adjudicate claims brought by private citizens against the state as if it were sued in an Article III tribunal. We hold that it is, instead, an appropriate – and constitutionally valid – method designed to permit enforcement of federal legislation implementing the Commerce Clause of the United States Constitution. We therefore AFFIRM the judgment of the district court and REMAND the case for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-5373

STATE OF TENNESSEE and TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION and ASSOCIATION OF WASTE HAZARDOUS MATERIALS TRANSPORTERS,

Defendants-Appellees.

Before: SILER, DAUGHTREY, and GILMAN, Circuit Judges.

JUDGMENT

(Filed Apr. 23, 2003)

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

STATE OF TENNESSEE and TENNESSEE DEPT. OF ENVIRONMENT and CONSERVATION	)	NO. 3:99-1126
v.	)	JUDGE CAMPBELL
U.S. DEPT. OF TRANSPORTATION, RESEARCH & SPECIAL PROGRAMS ADMINISTRATION and ASSOCIATION of WASTE HAZARDOUS MATERIALS TRANSPORTERS	)	

ORDER

Pending before the Court are the Magistrate Judge's Report and Recommendation (Docket No. 36) and Defendants' Objections and Motions for De Novo Determination (Docket Nos. 37 and 41) and the parties' Motions for Judgment on the Administrative Record (Docket Nos. 17, 21, and 24). The Court heard oral argument on February 23, 2001. For the reasons described herein, the Report and Recommendation is REJECTED and the case is referred back to the Magistrate Judge for a Report and Recommendation on the Motions for Judgment on the Administrative Record.

Plaintiffs, the State of Tennessee and the Tennessee Department of Environment and Conservation ("Tennessee"), filed this action asking the Court to overturn the United States Department of Transportation's ("DOT") determination that the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. §§ 5101-5127, preempts Tennessee's remedial action fee imposed on hazardous waste transporters. The Report and Recommendation sets out the facts and the pertinent history of HMTA, and it need not be repeated here. The Report and Recommendation finds that DOT's preemption determination was barred by Tennessee's sovereign immunity and, therefore, recommends that DOT's decision be vacated, and that the action be dismissed.

Pursuant to Rule 72(a) of the Federal Rules of Civil Procedure and Rule 303(g) of the Local Rules for Magistrate Proceedings, the Court may reverse or modify the ruling of the Magistrate Judge only if it is clearly erroneous or contrary to law.

Defendants argue that the Report and Recommendation erred in holding that Tennessee's sovereign immunity precludes DOT from determining that HMTA preempts Tennessee's remedial action fee. Defendants also argue that the Report and Recommendation applied an incorrect standard for determining the scope of state sovereign immunity. According to Defendants, DOT's preemption procedure does not infringe on the state's dignity in any manner similar to a lawsuit. Finally, the Defendants object to the Report and Recommendation on the ground that it improperly rejects application of controlling Sixth Circuit precedent, to-wit *Tennessee Department of Human Services v. U.S. Dept. of Education,* 979 F.2d 1162 (6th Cir. 1992).

Tennessee urges the Court to adopt the Report and Recommendation because Congress does not have the power under article I of the United States Constitution to abrogate Tennessee's sovereign immunity and subject the State to a binding adjudication before a Federal agency in an action commenced by a private party. According to the State of Tennessee, Tennessee's sovereign immunity is neither derived from nor limited by the Eleventh Amendment, and its sovereign immunity applies to Federal agency adjudication. More specifically, Tennessee claims that sovereign immunity bars adjudication by DOT of the claim that Tennessee's fee law is preempted. In addition, Tennessee argues that the Report and Recommendation properly applied the sovereign immunity principles articulated in recent Supreme Court cases to DOT's adjudication of the preemption claim. Tennessee particularly relies on *Alden v. Main*, 119 S.Ct. 2240 (1999) and *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). Finally, Tennessee argues that *Tennessee Dept. of Human Services* is not controlling precedent because it deals with Eleventh Amendment immunity and not sovereign immunity.

In *Tennessee Dept. of Human Services*, the Sixth Circuit held that Eleventh Amendment immunity did not bar Article I executive agency action in the form of an arbitration panel under the Randolph-Sheppard Act. 979 F.2d at 1166-1169. However, the Court did find that Eleventh Amendment immunity was applicable to a subsequent suit by an individual in Federal Court to enforce the arbitration panel's monetary award. Finally, the Sixth Circuit held that the statute did not contain a clear statement of Congress' intention to abrogate the state's Eleventh Amendment immunity and, therefore, the Court concluded that Eleventh Amendment immunity

barred the individual's suit in Federal Court to enforce the arbitration panel's award. *Id.*

In *Alden*, the Supreme Court held that states, under the United Sates Constitution, have sovereign immunity that is broader than the Eleventh Amendment. 119 S.Ct. at 2240. Nevertheless, *Alden* does not hold that state sovereign immunity applies to Federal executive administrative action. Moreover, nothing in *Alden* or *Seminole Tribe*, 116 S.Ct. at 1114, undermines the fundamental holding of *Tennessee Dept. of Human Services* that Eleventh Amendment immunity does not apply to Federal executive administrative action.

No Supreme Court opinion has ever applied state sovereign immunity to Federal executive administrative action. No United States Circuit Court has ever applied state sovereign immunity to Federal executive administrative action.

Based on the foregoing, the Court finds that *Tennessee Dept. of Human Services,* read in the context of the current Supreme Court Eleventh Amendment and sovereign immunity decisions, requires this Court to reject the Report and Recommendation. Under controlling Sixth Circuit precedent, Eleventh Amendment immunity does not apply to Federal executive administrative action. Neither the Supreme Court nor any Circuit Court has ever extended state sovereign immunity to Federal executive administrative action. Therefore, the Magistrate Judge's conclusion in the Report and Recommendation that TDOT's preemption determination was barred by Tennessee's sovereign immunity was contrary to law.

Having rejected the Report and Recommendation, the Motions for Judgment on the Administrative Record

(Docket Nos. 17, 21, and 24) are REFERRED to the Magistrate Judge for a further Report and Recommendation.

IT IS SO ORDERED.

/s/ Todd J. Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

STATE OF TENNESSEE, et al	)	
Petitioners,	)	**CASE NO. 3:99-1126**
v.	)	**JUDGE**
U. S. DEPARTMENT OF TRANSPORTATION, et al.,	)	**CAMPBELL/KNOWLES**
Respondents.	)	

REPORT AND RECOMMENDATION

I. Introduction and Background

By an Order entered July 17, 2000, (Docket Entry No. 30), the parties' cross-motions for judgment on the administrative record were referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Oral argument was held August 17, 2000. For the reasons discussed below, the undersigned recommends that Petitioners' motion be granted in part, that Respondents' motion be denied, that the decision of the Secretary of Transportation be vacated, and that this action be dismissed.

At bottom, this case involves a much simpler issue than the one the Court must address. That simple issue is whether a state statute and rule requiring those who transport hazard waste to or from locations in the State of Tennessee to pay an annual $650.00 remedial action fee are preempted by federal law, namely the Hazardous

Materials Transportation Act, 49 U.S.C. §§ 5101-5107. But because the Act creates an unusual administrative procedure, which the State claims violates its sovereign immunity, that issue must be addressed. That issue can best be understood after a discussion of the Act and the unusual procedure it establishes.

The Act was initially passed by Congress in 1975 "to replace a patchwork of state and federal laws and regulations concerning hazardous materials transport with a scheme of uniform, national regulations." *Southern Pac. Transp. Co. v. Public Ser. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990). The Act is intended "to provide adequate protection against the risks of life and property which are inherent in the transportation of hazardous materials in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 5101. There is no question that Congress acted under the Commerce Clause of the Constitution, Art. I, Sec. 8, cl.3, in passing the Act.

According to the Act's legislative history, the main purpose of the original legislation was "to broaden federal regulatory control over interstate and foreign shipments of hazardous materials by rail and other transportation modes." H.R. Rep. No. 1083, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7669. Congress vested primary authority over regulation of the transportation of hazardous materials in the Department of Transportation, so that a comprehensive approach to the minimization of risks associated with moving dangerous materials would be developed. *See* S. Rep. No. 1192, 93 Cong., 2d Sess 2 (1974). The Senate Committee noted in its report on the proposed legislation that "[a] prime difficulty discussed by most all of the witnesses . . . is that the fragmentation of

regulatory power among the agencies dealing with the different modes of transportation blocks a coherent approach to the problem." *Id.* at 8.

In view of these concerns, it is not surprising that Congress determined the Act should preempt state and local laws inconsistent with its provisions. The Senate Committee explained the federal preemption was necessary "to preclude a multiplicity of state and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." *Id.* at 37. Thus, the Act contains a lengthy section entitled "Preemption." *See* 49 U.S.C. § 5125.

Relevant provisions of § 5125 are quoted in the footnote,[1] and can be summarized as follows. Section 5125(a)

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[1] The Act provides in pertinent part as follows:

(a) **General.** Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian Tribe is pre-empted, if –

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

. . .

(d) **Decisions on Preemption.** (1) A person (including a State, political subdivision of a State, or Indian Tribe) directly affected by the requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on

(Continued on following page)

provides for the preemption of any requirement of a state, if that requirement, as applied or enforced, is an obstacle to accomplishing and carrying out the Act. Subsection (g) allows a state to impose a fee related to transporting hazardous material "only if" two conditions are met: (1) the fee must be fair and (2) the fee must be used for a purpose related to transporting hazardous material,

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whether the requirement is pre-empted by subsection (a)(b)(1), or (c) of this section. The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for as [sic] determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.

(2) After consulting with States, political subdivisions of States, and Indian Tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.

(3) Subsection (a) of this section does not prevent a State, political subdivision of the State, or Indian Tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

. . .

(f) **Judicial Review.** A party to a proceeding under subsection (d) or (e) of this section may bring a civil action in an appropriate district court of the United States for judicial review of a decision of the Secretary not later than 60 days after the decision becomes final. 49 U.S.C. § 5125.

including enforcement and planning, developing, and maintaining a capability for emergency response.

As mentioned above, the Act contains an unusual administrative procedure regarding preemption determinations. *See* § 5125(d),(f). Subsection (d) allows a person affected by a requirement of the State to seek a determination from the Secretary of Transportation as to whether that requirement is preempted by the Act. If such an application is made, the Secretary must publish notice of the application in the Federal Register. He must then issue a "determination" as to whether the State's requirement is preempted, within 180 days after the notice is published. Subsection (f) provides for judicial review of the decision of the Secretary made in a proceeding under subsection (d) by an appropriate district court of the United States.

Federal regulations enacted to implement § 5125 provide that a person affected by a requirement of a state may apply to the Associate Administrator for Hazardous Material Safety, Research and Special Programs for a preemption determination. 49 CFR § 107.203(a) and (b). The regulations also provide in part as follows:

> The Associate Administrator may initiate an investigation of any statement in an application and utilize in his or her evaluation any relevant facts obtained by that investigation. The Associate Administrator may solicit and accept submissions from third persons relevant to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Associate Administrator may consider any other source of information. The Associate Administrator on his or her own

> initiative may convene a hearing or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application.

49 CFR § 107.207(a).

Once the preemption determination is made, it "constitutes an administrative determination as to whether a particular requirement of a state . . . is preempted under the federal hazardous material transportation law or regulations issued thereunder." 49 CFR § 107.209(d). The Associate Administrator's determination becomes "final" when it is published in the Federal Register. 49 CFR § 107.213. A "party" to a preemption proceeding may seek review in U.S. District Court of a decision of the Associate Administrator by filing a petition with the Court within sixty days after the determination becomes final. *Id.*

At oral argument, counsel for the parties advised the Court that they were unaware of any other federal statute that creates such a proceeding, and the Court has found none.

The State of Tennessee has enacted what is indisputably "a fee related to transporting hazardous material." T.C.A § 68-212-203(a)(6) imposes a flat, annual $650 per company charge on transporters of hazardous waste.

On March 23, 1998, the Association Of Waste Hazardous Materials Transporters (the "Association") filed an application with the Secretary for a preemption determination, pursuant to § 5125(d). Per the appropriate statutory procedure, the Association's application was published in the Federal Register and interested parties were invited to submit comments. 63 Fed. Reg. 17479 (April 9, 1998) (A.R. at 121-25). After submission of

comments and rebuttal comments, the Associate Administrator issued his decision on October 6, 1999, in which he concluded that the fee was preempted by federal law. 64 Fed. Reg. 54474 (A.R. at 189-96). The Associate Administrator determined that the fee did not satisfy either requirement of § 5125(g) – the fee was not fair, and it was not used for purposes relating to transporting hazardous material.

On December 3, 1000 [sic], the State filed a petition with this Court for judicial review of the preemption determination, pursuant to § 5125(f).

II. Discussion

A. Summary of Arguments

The State argues that the procedures set forth in § 5125(d) impinge upon its sovereign immunity by allowing a person (or in this case a group) to force the State to defend itself and one of its regulations in a proceeding conducted in a federal forum. A few short years ago, such an argument would have been summarily dismissed, but the law of sovereign immunity has undergone drastic changes in the recent years as a result of several very significant decisions of the United States Supreme Court.

The State begins with a proposition recently recognized by that Court that "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. ___, 144 L.Ed. 2d 636, 119 S.Ct. 2240, 2246 (1999). According to the State, the *Alden* Court ruled that Congress does not have the power to abrogate a state's sovereign immunity and subject it to private suits in state courts for violations

of any federal statutes Congress has enacted under its Article I powers. *Id.* at 2266.

The State further argues that Congress lacks the power to abrogate a state's immunity from suits by individuals filed in federal courts for violations of any federal statutes Congress has enacted under its Article I powers, citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L.Ed. 2d 252, 116 S.Ct. 1114 (1996).

The State concludes that, if Congress lacks the power to force states to defend suits brought by individuals in federal courts or state courts, then Congress must also lack the power to submit states to "binding adjudication before a federal agency in a proceeding commenced by a private party."

Respondents argue that the holdings of *Alden* and *Seminole Tribe* should be narrowly viewed and that they simply do not apply to the case at bar, which does not involve a "suit" in either state or federal court. Respondents contend that the State's sovereign immunity claims are governed by the Eleventh Amendment to the United States Constitution, which provides as follows:

> **Suits against states – Restriction of Judicial Power.**
>
> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

If this were indeed the test, the State's arguments could be disposed of easily on the grounds that: (1) the administrative procedure at issue does not involve the judicial power

of the United States or the jurisdiction of the federal courts; and (2) the administrative procedure at issue is not a "suit."

Unfortunately, this simple and logical analysis has no place in sovereign immunity jurisprudence.

The Court has been unable to locate any relevant decisions construing the Act at issue. Additionally, there appear to be no other federal statutes that provide a similar administrative procedure, so there are no cases construing similar provisions in other federal legislation. The question, therefore, appears to be one of first impression, and the Court will review the Eleventh Amendment and the concept of sovereign immunity in some detail below.

B. The Enactment of the Eleventh Amendment and its Early Expansion

1. The Enactment of the Eleventh Amendment

The logical starting point for a consideration of these concepts is the case that gave rise to the passage of the Eleventh Amendment, *Chisholm v. Georgia*, 2 U.S. (2. Dall.) 419, 1 L.Ed. 440 (1793). In *Chisholm*, the Plaintiff, who was a citizen of South Carolina, sued the State of Georgia in the U.S. Supreme Court to enforce Georgia's promise to pay for goods purchased during the Revolutionary War. The suit was initially brought in the Supreme Court itself, apparently because the suit fell within the original jurisdiction of that Court as established in Article III, which provides, "In all cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." Furthermore, the Judiciary Act of 1789 had provided in part "the Supreme Court shall have exclusive

jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except, also, between a state and citizens of other states and aliens, in which latter case, it shall have original, but not exclusive jurisdiction." Ch. 20, § 13, 1 Stat. 73, 80.

Georgia raised the defense of sovereign immunity. The Supreme Court, however, decided that the case could proceed in spite of the state's claim of sovereign immunity. Although the reported decision is somewhat difficult to follow, with the Justices writing individual opinions, it appears that the *Chisholm* Court based its decision at least in part upon Article III, Section 2, Clause 1, which provides in part "the judicial power shall extend . . . to Controversies . . . between a State and Citizens of another State . . . " Additionally, as discussed above, the Judiciary Act of 1789 had spoken to suits in which a state was a party.

Thus, both the Constitution and the Judiciary Act of 1789 apparently allowed actions in which states were parties. Moreover, nothing in the language of the Constitution prohibited a state from being a Defendant. Several of the Justices spoke to the fact that the people of the United States had established their right to be free of the "sovereignty" of European governments, which, according to Chief Justice Jay, was based on "feudal principles." 1 L.Ed. at 463. Justice Wilson summed up his thoughts as follows:

> To the Constitution of the United States the term sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who

> ordained and established that constitution. They might have announced themselves "sovereign" people of the United Stats; but serenely conscious of the fact, they avoided the ostentatious declaration.

1 L.Ed. at 455.

According to the U.S. Supreme Court, speaking some years later, *Chisholm* created a "shock of surprise" around the nation, because at least some of the Founders considered the concept of a State's sovereign immunity to have been "inherent" in the Constitution. *See Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 846 (1890). Thus, according to the *Hans* Court, the Eleventh Amendment was "almost unanimously proposed" in Congress following the *Chisholm* decision and was duly adopted.[2]

For reasons that are not readily apparent, at least to those viewing the situation more than 200 years later, the Eleventh Amendment seems to have been a rather roundabout way to address the concerns of those who may have wished to clarify or to establish the concept of the state's sovereign immunity. The Eleventh Amendment says nothing about sovereign immunity. Rather, by its plain terms, the Eleventh Amendment merely restricts the

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[2] The Eleventh Amendment was submitted to the legislatures of the several states by the Third Congress on March 4, 1974. *See* Amendment 11, USCA Explanatory Note. Although it is not specifically set forth in the decision itself, one authority states that the *Chisholm* decision was issued in February 1793. *See* Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Cornell L.Rev. 1269, 1333 (1998). This article provides an excellent history of the Eleventh Amendment and the reasons for its proposal and enactment.

"judicial power of the United States," in basically two classes of cases: any suits (in law or equity) against one of the United States brought by (1) citizens of another State or (2) citizens or subjects of any foreign state.

At this point, it should be noted that, when the Eleventh Amendment was ratified and added to the Constitution in 1795 (or 1798),[3] the federal courts could not exercise general federal question jurisdiction. It is well-settled that Article III is not self-executing, at least with respect to the lower federal courts. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234, 43 S.Ct. 79, 67 L.Ed. 226 (1922). The Judiciary Act of 1789, which created inferior federal courts, gave those courts jurisdiction over admiralty cases, major federal criminal offenses, and diversity cases. It did not, however, give them jurisdiction over questions involving federal law. 15 Moore's Federal Practice 3d, § 100 App.01, p. 100App. -4 through -5. It was not until the Judiciary Act of 1875 that the inferior federal courts were given general federal question jurisdiction.[4] *See* 18 Stat. 470, pt. 3 (1875).

These facts may explain why the Eleventh Amendment itself does not address the "judicial power of the United States" in cases involving a suit by a citizen

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[3] It is somewhat unclear whether the effective date of the Eleventh Amendment was 1795, when three-fourths of the States ratified it, or whether it became effective on January 8, 1798, when President John Adams proclaimed it to be a "Part of the Constitution." *See* Pfander, *supra*, n. 2, at 1270-71 and n. 5.

[4] The short-lived "Midnight Judges Act" of 1801 very briefly gave the federal courts general federal question jurisdiction, but that jurisdiction was withdrawn almost immediately. *See* Ch. 4, 2 Stat. 89 (1801), *repealed in* Ch. 8, Stat. 132 (1802).

against his own state. When the Eleventh Amendment was ratified, the "judicial power" of the inferior federal courts did not apply to such a case.

2. The *Hans* Expansion of the Eleventh Amendment

When the lower federal courts were vested with general federal question jurisdiction in 1875, it became at least theoretically possible for a citizen to sue his own state in federal court under that grant of jurisdiction. Shortly thereafter, the Supreme Court decided its first major Eleventh Amendment case, *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842 (1890).

In *Hans*, Plaintiff, who was a citizen of the State of Louisiana, sued the State of Louisiana to recover the amount of coupons annexed to bonds that had been issued by the State in 1874.[5] Plaintiff's legal claim was that the

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[5] The situation presented in *Hans* could not have arisen prior to 1875 and, apparently did arise only in 1884 when *Hans* initially filed his lawsuit in federal "circuit court." As discussed above, Art. III, Cl. 2 of the Constitution had given the Supreme Court original jurisdiction over "all Cases . . . in which a State shall be Party." The jurisdiction actually granted by Congress to the Supreme Court in the Judiciary Act of 1789, however, specifically prohibited the exercise of the Supreme Court's original jurisdiction in cases "between a State and its citizens." *See* Warren, *History of the Federal Judiciary Act of 1789*, 37 Harvard L. Rev. 49, 93 (1923). ("The fear had been expressed in many of the State Conventions that the language of the Constitution authorized a suit against a sovereign state by its own citizens, in the Supreme Court, and the change from the draft Bill was evidently made to allay this fear."). Thus, following the enactment of the Judiciary Act of 1875, Plaintiff in *Hans* was able to file his action initially in a lower federal court (at the time, known as the "circuit court.") The Supreme Court in *Hans* was exercising its appellate jurisdiction, not its original jurisdiction.

State of Louisiana, by adopting a new Constitution which specifically repudiated the bond coupons at issue, had violated Art I, Sec. 10 of the U.S. Constitution (prohibiting the impairment of contracts).

The Supreme Court held that such an action was barred by the Eleventh Amendment, even though the plain language of that Amendment prohibits only suits against states by citizens of "another state." In reaching this decision, the Court relied not upon the language of the Eleventh Amendment, but upon the "intent" of at least some [sic] the framers of the Constitution and apparently what it perceived to be the "gestalt" of the states that had ratified the Eleventh Amendment almost 100 years earlier.

The *Hans* Court began with the proposition that, under Article III of the Constitution and the Judiciary Act of 1875, "The judicial power of the United States shall extend to all cases in law and equity arising under this Constitution, the laws of the United States and treaties made or which shall be made under their authority." Plaintiff in *Hans* argued that these jurisdictional clauses applied regardless of "the character of the parties," and regardless of the fact that the Defendant was a state. This argument, which quite properly focused on the language of the relevant Constitutional and statutory provisions, was essentially the same argument that had been made by the plaintiff in *Chisholm*. When the State raised the Eleventh Amendment as a bar to the suit, Plaintiff responded that the language of the Eleventh Amendment prohibits only suits against a state that are brought by citizens of *another* state, or by citizens or subjects of a foreign state.

The *Hans* Court began its analysis as follows:

> It is true, the Amendment does so read; and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or a foreign state; and may thus be sued in the federal courts, although not allowing itself to be sued in its own courts.

134 U.S. at 10, 33 L.Ed. at 845.

The *Hans* Court further noted that "the highest authority of this country" agreed with the lone dissenter in *Chisholm* rather than the majority of the Court. The *Hans* Court continued:

> The other justices [in *Chisholm*] were more swayed by a close observance of the letter of Constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversy "between a State and citizens of another State;" and "between a State and foreign states, citizens or subjects," they felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. *Justice* Irdell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals (which he conclusively showed was never done before), but only by proper legislation, to invest the federal courts

> with jurisdiction to hear and determine controversies and cases between the parties designated, but were properly susceptible of litigation in courts.

134 U.S. at 12, 33 L.Ed. at 846.

Thus, the *Hans* Court firmly established the extraordinary principle that the Eleventh Amendment and the Constitution, at least insofar as they may relate to the sovereign immunity of the states, were not to be interpreted solely, or even primarily, by reference to their language. Rather, both were to be construed with "regard to former experience and usage," sometimes at the expense of their plain language.

After discussing the view of several of the Founders, the *Hans* Court stated:

> It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. *Can we suppose that, when the 11th Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the federal courts, whilst the idea of suits by citizens of other States or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the 11th Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own*

> *citizens in cases arising under the Constitution or laws of the United States. Can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.*

134 U.S. at 14-15, 33 L.Ed. at 847 (emphasis added.)[6]

Finally, the *Hans* Court seemingly felt it necessary to try to remove some of the sting of its decision by reminding the States of their obligations essentially to "do the right thing." The Court stated as follows:

> To avoid misapprehension it may be proper to add that although the obligations of the State rest for their performance upon its honor in good faith, and cannot be made the subjects of judicial cognizance unless the State consents to be sued, or comes itself into Court, yet where property or rights are enjoyed under a grant or contract made by a State they cannot wantonly be evaded. While the State cannot be compelled by suit to perform its contract, any attempt on its part to violate property or rights acquired under its contracts, may be traditionally resisted; and any law

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[6] Thus, the *Hans* decision rests on an assumption that, if the federal courts had been able to exercise general federal question jurisdiction in 1794, the Eleventh Amendment would have included a bar to citizen's suing his own state in federal court for a violation of federal law. While that proposition itself may be subject to debate (*see* note 12, *infra*), is very curious that the *Hans* Court did not speak to several major events of the 19th century that perhaps might have led the Court to conclude that what Congress and the States may have done in 1794 was not particularly relevant to how the Supreme Court should interpret the Eleventh Amendment some 100 years later. Those events were the Civil War and the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments.

> impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.
>
> It is not necessary that we should enter upon an examination of the reason of expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence. *The legislative department of the State represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the Legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself.* But to deprive the Legislature of the power of judging what the honor and safety of the State may require, even at the expense of the temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.

134 U.S. at 20-21, 33 L.Ed. at 849 (emphasis added).[7]

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[7] It certainly seems that the Civil War would have already cast doubt on the statements of the *Hans* Court that the states could be relied upon to scrupulously guard the federal rights of their citizens. The post-Civil War Amendments, the Thirteenth (ratified in 1865), the Fourteenth (ratified in 1868), and the Fifteenth (ratified in 1870), had clearly provided instances in which a citizen of a state might have cause to sue his own state, all with the blessing of the Constitution, as amended.

Hans has been criticized by numerous commentators and Justices of the Supreme Court who have suggested that it should be overruled.[8] Nevertheless, it has been reaffirmed by the Supreme Court on many occasions, as will be discussed below, and it remains binding precedent.

C. The *Young* "Exception" to the Eleventh Amendment

In the approximately 100 years following *Hans*, the Eleventh Amendment remained somewhat dormant, largely because of an "exception" to it recognized by the Supreme Court in *Ex Parte Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1908). In *Young*, which was decided only 18 years after *Hans*, a group of railroads was dissatisfied with several tariff and rate fixing laws adopted by the State of Minnesota, which they believed to be unconstitutional. The railroad companies apparently believed that a direct action against the State of Minnesota, filed in federal court, would be barred by the Eleventh Amendment. Thus, instead of suing the state directly, they filed suit against the Attorney General of Minnesota and they

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[8] Perhaps the most often-cited criticism of *Hans* and the Supreme Court's expansive view of the doctrine of sovereign immunity came in Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 87 L.Ed. 2d 171, 105 S.Ct. 3142 (1985), which was joined by Justices Marshall, Blackmun, and Stevens. Another major discussion concerning the possible overruling of *Hans* can be found in Justice Brennan's dissent in *Welch v. State Department of Highways*, 483 U.S. 468, 97 L.Ed. 2d 389, 107 S.Ct. 2941 (1987), in which Justices Brennan, Marshall, Blackmun, and Stevens all agreed that *Hans* should be overruled.

sought an injunction to prevent him from enforcing the laws at issue. The Attorney General argued that the action was in effect one against the State of Minnesota, and was thereby barred under the Eleventh Amendment.

The Supreme Court held that such an action was proper and was not barred by the Eleventh Amendment. The *Young* Court reasoned that, if the state laws at issue were indeed unconstitutional, an attempt to enforce them would be "a proceeding without the authority of, and on [sic] which does not affect, the state in its sovereign or governmental capacity." 123 U.S. at 159, 52 L.Ed. at 729. Thus, any attempt by the state Attorney General to enforce these unconstitutional laws would be illegal. Under such circumstances, he would be stripped of his "official or representative character," and the State could not impart any of its immunity to him.

The Court's reasoning was not unassailable, however, because Plaintiffs had to show "state action," as an essential element of their claim under the Fourteenth Amendment. Thus, the *Young* Court recognized the proposition that the action of the State Attorney General constituted "state action" for purposes of the Fourteenth Amendment, but did not constitute "state action" for purposes of the Eleventh Amendment. 123 U.S. at 168, 59 L.Ed. at 732. Be that as it may, *Young* gave individuals a convenient way essentially to sue states for alleged violations of federal rights without violating the Eleventh Amendment.

D. The Constructive Waiver Theory

In 1964, the Supreme Court announced and applied a sovereign immunity "constructive waiver" theory in *Parden v. Terminal R. Co.*, 377 U.S. 184, 12 L.Ed. 2d 233,

84 S.Ct. 1207 (1964). In *Parden*, the State of Alabama owned and operated a railroad in interstate commerce. Plaintiffs, who were employees of the railway, were injured in the course of their employment, and brought an action against the railway under the Federal Employers Liability Act (FELA). The State moved to dismiss on grounds that the railway was an agency of the state and, therefore, an action against it was barred by the Eleventh Amendment.

Justice Brennan, writing for the Court, stated two issues for decision: (1) Did Congress in enacting the FELA intend to subject a State to suit under these circumstances? and (2) Did Congress have the *power* to do so, as against the State's claim of sovereign immunity? 377 U.S. at 187, 12 L.Ed. 2d at 237. The *Parden* Court answered both questions in the affirmative. First, the Court held that Congress meant what it said when it made FELA applicable to "every" common carrier by railroad in interstate commerce. 377 U.S. at 187, 12 L.Ed. 2d at 237. The *Parden* Court stated in part as follows:

> To read a "sovereign immunity exception" into the [FELA], would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damage employees but left one class of such employees – those whose employers happened to be state owned – without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result.

377 U.S. at 190, 12 L.Ed. 2d at 238.

With regard to the second question the *Parden* Court found that, "The States surrendered a portion of their

sovereignty when they granted Congress the power to regulate commerce [in the Constitution]." 377 U.S. at 191, 12 L.Ed. 2d at 239. The majority explicitly stated that Congress had the power, when acting under the Interstate Commerce Clause, to override any sovereign immunity that may otherwise have been retained by the states.

At the same time, however, the *Parden* Court refused to find that the State's sovereign immunity had actually been overridden by Congress. Instead, the Court ruled that the State had essentially waived its sovereign immunity by beginning operation of a railroad when it essentially "knew or should have known" that the FELA would be applicable. The Court stated:

> Recognition of the congressional power to render a State sueable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the *Hans* case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act.

377 U.S. at 192, 12 L.Ed. 2d at 240.

The four dissenters in *Parden* argued that a waiver of sovereign immunity should not be found unless Congress had "expressly declared that any State which undertakes given regulable [sic] could be deemed thereby to have waived its immunity." 377 U.S. at 199, 12 L.Ed. 2d at 244.

E. The Restriction of the *Young* Exception

1. *Edleman v. Jordan*

Only ten years later, in 1974, it became apparent that the Supreme Court was beginning a retreat from at least some of the doctrines that had limited the sovereign immunity of the states. *See Edleman v. Jordan*, 415 U.S. 651, 39 L.Ed. 2d 662, 94 S.Ct. 1347 (1974). In *Edleman*, plaintiffs filed a class action against various officers of the State of Illinois. Plaintiff complained that these state officials were administering the federal-state programs of Aid to the Aged, Blind and Disabled in a manner inconsistent with various federal regulations and the Fourteenth Amendment. Plaintiff sought an injunction, requiring the state officers to properly enforce the federal law in the future. Plaintiff also sought "equitable relief," in the form of an injunction requiring defendants to award to the class past benefits that had been allegedly wrongfully withheld.

The state officers conceded that the prospective injunctive relief was proper under *Ex Parte Young*. The state officials argued, however, that the "equitable relief" which required the State to pay past benefits was essentially an award of damages that was barred by the Eleventh Amendment.

The significance of the Supreme Court's decision in *Edleman* can best be understood if one first considers the decision of the Seventh Circuit in that case, which the Supreme Court reversed. *See Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973). Plaintiffs' lawsuit was clearly one brought against the state officials, not the state itself, under *Ex Parte Young*. The Seventh Circuit began its analysis by noting that four different three-judge court

decisions, which had rejected identical Eleventh Amendment arguments, had been previously appealed to the Supreme Court, and the Supreme Court had summarily affirmed each case. 472 F.2d at 989.

Next, the Seventh Circuit refused to read *Young* as applying only where a Plaintiff sought prospective injunctive relief, rather than retrospective injunctive relief. The Seventh Circuit cut to the heart of the matter when it stated:

> Of course, there is nothing inherent in [the *Young*] fiction which precludes its utilization to allow equitable relief other than an injunction against future conduct. The state official can be said to be "stripped of his official or representative character" when ordered to pay out benefits he withheld in violation of federal law.

472 F.2d at 990 n.10.

The Seventh Circuit also noted that many mandatory injunctions had been granted on the authority of *Ex Parte Young* that had "certainly had an impact on the State Treasury by requiring the expenditure of public funds." 472 F.2d at 991 (citing cases). The Seventh Circuit stated that the prospective injunctive relief granted by the District Court, which required state officials to comply with federal law in the future, would require the expenditure of "more monies than the seriously disputed part of the judgment requiring the payment of wrongfully withheld benefits!" *Id.* The Seventh Circuit concluded, "whether a liability is declared which must be met from the State's public funds is not the touchstone of the Eleventh Amendment's applicability." *Id.*

The Supreme Court, in a 5-4 decision, agreed with the state officials that the retroactive equitable relief was improper. Justice Rehnquist, writing the majority opinion, stated the "well-established" proposition that "even though a State is not named a party to the action, the suit may nevertheless be barred by the Eleventh Amendment." He continued:

> [W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.

415 U.S. at 663, 39 L.Ed. 2d at 672, *quoting Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 89 L.Ed. at 464, 65 S.Ct. 347 (1945).

Thus, the *Edleman* Court reasoned, a suit by private parties seeking to impose a liability that must be paid from public funds in the state treasury is barred by the Eleventh Amendment.[9] 415 U.S. at 663, 39 L.Ed. 2d at 673.

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[9] The *Edleman* majority cited three cases for the proposition that, even though individual officers are nominal defendants, the state is the real substantial party in interest if the suit is one for recovery of money from the State Treasury, namely *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 89 L.Ed. 389, 65 S.Ct. 347 (1945), *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 88 L.Ed. 1121, 64 S.Ct. 873 (1944), and *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 90 L.Ed. 862, 66 S.Ct. 745 (1946). As some commentators have noted, these three cases all involved state tax claims. *See* LeClercq, *State Immunity and Federal Judicial Power – Retreat From National Supremacy*, 27 Florida L. Rev. 361, 378 n.13 (1975), which

(Continued on following page)

The *Edleman* majority refused to read *Ex Parte Young* as meaning that "any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature." 415 U.S. at 666, 39 L.Ed. 2d at 674-75. The *Edlemam* [sic] Court also declined to follow the precedent cited by the Seventh Circuit, because the Supreme Court had summarily disposed of those cases without "any substantive discussion of this or any other issues raised by the parties." 415 U.S. at 670, 39 L.Ed. 2d at 677.

Justice Brennan, dissenting, reiterated his position set out in *Parden*, that the states had surrendered part of their sovereign immunity when they ratified the Constitution, at least insofar as they granted Congress specifically enumerated powers. Because Congress had the authority to pass the act in question under the Commerce Clause, he concluded that the State had no immunity. Dissenting Justices Marshall and Blackmun stated that, by agreeing to accept federal funds under the Social Security Act, the state had waived any immunity it may have had from federal court orders requiring the retroactive payment of welfare benefits. Justice Douglas, dissenting, noted the

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discusses the fact that the brief of respondents in *Edleman* had distinguished these three cases arguing "these cases [a]t most ... reflect the unique considerations that surround federal judicial interference with enforcement of state tax law and the underlying policy of the federal courts not to decide these cases where an adequate remedy is otherwise available." Professor LeClercq further noted that, unlike *Kennecott, Ford* and *Read, Edleman* presented "important questions of federal public policy in which state law [was] largely irrelevant." *Id.*

fact that the Eleventh Amendment restricts the "judicial power" of the United States in certain classes of cases, and applies to "any suit *in law or equity*." 415 U.S. at 685, 39 L.Ed. 2d at 685. He continued:

> If that "judicial power," or "jurisdiction," if one prefers that concept, may not be exercised even in 'any suit in . . . equity' then Ex Parte Young should be overruled. But there is none eager to take the step. Where a State has consented to join a federal-state cooperative project, it is realistic to conclude that the State has agreed to assume its obligations under that legislation. There is nothing in the Eleventh Amendment to suggest a difference between suits at law and suits in equity, for it treats the two without distinction. If common sense has any role to play in constitutional education, once there is a waiver of immunity it must be true that it is complete so far as effective operation of the state-federal joint welfare program is concerned.

Id.

Edleman is important for two holdings. First, it restricts the relief available under *Ex Parte Young* to *prospective* injunctive relief. Second, it deprives a plaintiff of the potential remedy of seeking damages from Defendants sued in their individual capacities under *Ex Parte Young*, if a court concludes that plaintiff is not really seeking damages against the Defendants individually, but instead is seeking damages that will be paid out of a

state's treasury. How a court may determine this distinction is extremely unclear.[10]

2. *Pennhurst State School & Hospital v. Halderman*

Another milepost in the Supreme Court's restriction of *Ex Parte Young* came in 1984, with the decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 79 L.Ed. 2d 67, 104 S.Ct. 900 (1984) (hereinafter "*Pennhurst II*"). In that case, the Court held that the Eleventh Amendment prohibited an individual from suing her own state in federal court for a violation of *state* law, and that the *Young* exception did not apply.

The case had previously been before the Supreme Court in 1981. *See Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 67 L.Ed. 2d 694, 101 S.Ct. 1531 (1981) (hereinafter "*Pennhurst I*"). In *Pennhurst I*, Plaintiff brought a class action lawsuit on behalf of the patients at a state institution for the care of "the mentally retarded." 465 U.S. at 92, 79 L.Ed. 2d at 73. *Pennhurst I* sought both damages and injunctive relief. Plaintiffs claimed violations of a number of federal laws (the Eighth

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[10] With regard to this point, there is no question that Plaintiffs in *Edleman* sued the state officials themselves, and did not request any monetary relief against the state. The Supreme Court stated, however, "It [the monetary relief ordered by the Seventh Circuit] will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action." 425 U.S. at 668, 39 L.Ed. 2d at 676. Additionally, the Court stated "these funds [the retroactive award of money damages] will obviously not be paid out of the pocket of petitioner Edleman." 415 U.S. at 664, 39 L.Ed. 2d at 673. But the Court never explained why that fact was so obvious.

and Fourteenth Amendments, § 504 of the Rehabilitation Act of 1973, and the Developmentally Disabled Assistance and Bill of Rights Act), and state law as well. The District Court ruled in favor of Plaintiffs, granting prospective injunctive relief, and the Third Circuit affirmed most of that judgment. The Third Circuit, however, relied solely on the "Bill of Rights" provision in the federal Developmentally Disabled Assistance and Bill of Rights Act.

On the first appeal, the Supreme Court in *Pennhurst I* found that that Act did not create any substantive rights. The Court remanded the case to the Third Circuit to determine if the remedial order could be supported on the basis of state law, the Constitution, or § 504 of the Rehabilitation Act.

On remand, the Third Circuit affirmed its prior judgment solely on the basis that Defendants had violated Pennsylvania state law, and that court did not reach any of the remaining issues of federal law.

On the second appeal, the Supreme Court revised and remanded, holding that Plaintiffs' state law claims were barred by the Eleventh Amendment, and that the "exception" of *Ex Parte Young* did not apply, even though the lower court had granted only prospective injunctive relief.

The *Pennhurst II* Court began its analysis with the following "overview" of Eleventh Amendment jurisprudence, at least to that point:

> When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principals [sic] are well established. The Eleventh Amendment bars

> a suit against State officials when "the State is the real, substantial party in interest," . . . Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." . . . And, as when the State is named as the Defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief.
>
> The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State [citing *Young*].

465 U.S. at 101-02, 79 L.Ed. 2d at 79. The Court went on to note, however, that theory of *Young* "has not been provided an expansive interpretation," citing *Edleman*. 465 U.S. at 102, 79 L.Ed. 2d at 80.

Plaintiffs in *Pennhurst II* argued that the *Young* exception applied and that *Edleman* did not bar their lawsuit, because the courts below had ordered only prospective injunctive relief. But the Supreme Court determined the "basis of the doctrine established in *Young* and *Edleman*" did not apply where Plaintiffs alleged only violations of *state* law, rather than federal law. The Court specifically noted, "in deciding this case we must be guided by 'the principles of federalism that inform Eleventh Amendment doctrine.'" 465 U.S. at 100, 79 L.Ed. 2d at 78 (citation omitted). In a rather candid and "practical" analysis, the Court stated in pertinent part as follows:

> [T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." . . . As Justice Brennan has observed, "*Ex Parte*

> *Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." . . . Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. . . .
>
> The Court has also recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edleman v. Jordan, supra*. We recognized that the prospective relief authorized by *Young* has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect." . . . But we declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States . . . In sum, *Edleman's* distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex Parte Young* while at the same time preserving to an important degree the constitutional immunity of the States.
>
> This need to reconcile competing interests is wholly absent, however, when a Plaintiff alleges that a state official has violated *state law*. In such a case the entire basis for the doctrine of *Young* and *Edleman* disappears.

465 U.S. at 105-06, 79 L.Ed. 2d at 81-82.

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented. The thrust of the dissenting opinion was that the question addressed by majority,

i.e. whether a federal court may award prospective injunctive relief on the basis of *state* law without violating the Eleventh Amendment, had already been answered affirmatively by the Court "many times in the past." The dissent accused the majority of repudiating "at least twenty-eight cases, spanning well over a century of this Court's jurisprudence, proclaiming instead that federal courts have no power to enforce the will of the states by enjoining conduct because it violates state law." 464 U.S. 127, 79 L.Ed. 2d at 96.

As the dissent also pointed out, the "immunity-stripping" rationale of *Young* plainly applies to a case in which a state official violates state law. 465 U.S. at 147, 79 L.Ed. 2d at 109.

In response to this point, the majority simply asserted that *Edleman* "shows that the broad ultra vires theory enunciated in Ex Parte Young . . . and in some of the cases quoted by the dissent has been *discarded*." 465 U.S. at 114 n.25, 79 L.Ed. 2d at 87 n.25 (emphasis added).

The dissent concluded as follows:

> Throughout its history this Court has derived strength from institutional self-discipline. Adherence to settled doctrine is presumptively is [sic] the correct course. Departures are, of course, occasionally required by changes in the fabric of our society. When a Court rather than a legislature, initiates a departure, it has a special obligation to explain and to justify the new course on which it has embarked. Today, however, the Court casts aside well-settled respected doctrine that plainly commands affirmance of the Court of Appeals – the doctrine of the law of the case, the doctrine of stare decisis (the Court repudiates at

> least twenty-eight cases), the doctrine of sovereign immunity, the doctrine of pendant jurisdiction, and the doctrine of judicial restraint. No sound reason justifies the further prolongation of this litigation or this Court's voyage into the sea of undisciplined lawmaking.

465 U.S. at 164-67, 79 L.Ed. 2d at 120-121.

3. *Idaho v. Coeur d'Alene Tribe of Idaho*

Another significant restriction of the *Ex Parte Young* doctrine was set forth in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 138 L.Ed. 2d 438, 117 S.Ct. 2028 (1997). In *Coeur d'Alene*, a Tribe sued the state of Idaho in federal court claiming that it owned the banks of and submerged lands under Lake Coeur d'Alene. Relying upon *Ex Parte Young*, Plaintiff sued state officials for a declaratory judgment to establish its ownership of the Lake and the submerged lands, and a prospective injunction, prohibiting the state from regulating the Tribe's rights of exclusive use and occupancy. Plaintiffs' claim was based on federal law, namely an Executive Order of November 8, 1873, which apparently had set out the original boundaries of the Coeur d'Alene reservation. Alternatively, the Tribe claimed ownership of the lands pursuant to "unextinguished aboriginal title." 521 at U.S. at ___, 138 L.Ed. 2d at 455.

The Supreme Court, however, held that the lawsuit was barred by Idaho's sovereign immunity. Essentially, the Court held that the suit at issue was "the functional equivalent of a quiet title action which implicated special sovereignty interests." 521 U.S. at ___, 138 L.Ed. 2d at 455.

The *Couer d'Alene* Court also noted that the lawsuit could have been brought in Idaho state court, but Plaintiffs had chosen to file it in federal court. The Court stated:

> It is apparent, then, that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury. Under these particular and special circumstances, we find the *Young* exception inapplicable. The *dignity and status of its statehood* allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

521 U.S. at ___, 138 L.Ed. 2d at 459 (emphasis added).

F. Questions About the Power of Congress to Abrogate the States' Sovereign Immunity

The extent of the Court's changing view of sovereign immunity became very apparent in *Pennsylvania v. Union Gas Company*, 491 U.S. 1, 105 L.Ed. 2d 1, 109 S.Ct. 2273 (1989). The questions presented in *Union Gas* were the same as those that had been presented in *Parden* only 25 years earlier, except that a different statute was involved. The Court stated the issues in *Union Gas* as follows:

> This case presents the questions whether the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA) . . . as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) . . . permits a suit for monetary damages [by an individual] against a State in federal court and, if so,

> whether Congress has the authority to create such a cause of action when legislating pursuant to the Commerce Clause.

491 U.S. at 5, 105 L.Ed. 2d at 10.

As in *Parden*, a majority of the Court answered "yes" to the first question, arguing that the referenced statutes fully expressed an intent to hold states liable in damages for conduct prohibited by the statute.

The second question, however, proved to be much more difficult, giving rise to five separate opinions. Only four justices specifically joined in Justice Brennan's opinion that Congress had the *power* to provide for the recovery of damages in lawsuits by individuals against states. These four justices agreed with the *Parden* rationale that Congress has the authority to abrogate the states' sovereign immunity when legislating pursuant to the plenary powers granted it by the Constitution. 491 U.S. at 15, 105 L.Ed. 2d at 16.

Justice Scalia, concurred in part and dissented in part, in an opinion joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy. He concluded that the statutes at issue provided that the states were liable to private persons for money damages. He then considered the "continuing validity" of *Hans*, determining that it should not be overruled. 491 U.S. at 35, 105 L.Ed. 2d at 30. The thrust of his opinion was that *Parden's* "holding" that the Commerce Clause gave Congress the power to abrogate the sovereign immunity of the States, should be overruled. 491 U.S. at 43, 105 L.Ed. 2d at 35.

Justice White, concurring in the judgment in part and dissenting in part, joined by Chief Justice Rehnquist,

Justice O'Connor, and Justice Kennedy believed that the statutes at issue did not contain an "unmistakably clear" statement by Congress that it wished to abrogate the States' sovereign immunity. 491 U.S. at 55, 105 L.Ed. 2d at 43. In a second part of his opinion, Justice White recognized that he was in the minority in that view, and he stated, "I agree with the conclusion reached by Justice Brennan ... that Congress had the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." 491 U.S. at 57, 105 L.Ed. 2d at 43-44. Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy did not join that part of his opinion.

Finally, Justice O'Connor, dissenting, believed that Congress did not have the power, acting under the Commerce Clause, to abrogate the States' sovereign immunity. 491 U.S. at 57, 105 L.Ed. 2d at 44. She recognized that "that view does not command a majority of the Court. . . ." *Id.* She further agreed that the relevant statute did not contain an "unmistakably clear" statement by Congress. *Id.*

In the final analysis, five of the Justices in *Union Gas* had agreed that Congress had the power to abrogate the states' sovereign immunity when legislating under Article I. The other four did not.

Union Gas is also notable because it contains, in the concurring opinion of Justice Stevens, a very candid and straightforward discussion of the different and conflicting views of the Eleventh Amendment and the doctrine of sovereign immunity that had been expressed in past Supreme Court cases. Justice Stevens noted that the

Court had drawn a "distinction between our two Eleventh Amendments." He stated in part as follows:

> There is first the correct and literal interpretation of the plain language of the Eleventh Amendment. . . . In addition, there is the defense of sovereign immunity that the Court has added to the text of the Eleventh Amendment in cases like *Hans v. Louisiana*, 134 U.S. 1 (1890). With respect to the former – the legitimate scope of the Eleventh Amendment limitation on federal judicial power – I do not believe Congress has the power under the Commerce Clause, or under any other provision of the Constitution, to abrogate the State's immunity. A statute cannot amend the Constitution. With respect to the latter – the judicially created doctrine of state immunity even from suits alleging violation of federally protected rights – I agree that Congress has plenary power to subject the State to suit in federal court.
>
> . . .
>
> In [*Hans*], the Court departed from the plain language, purpose, and history of the Eleventh Amendment, extending to the State's immunity from suits premised on the "arising under" jurisdictional grant of Article III. *Later adjustments to this rule, as well as the Court's inability to develop a coherent doctrine of Eleventh Amendment immunity, make clear that this expansion of state immunity is not a matter of Eleventh Amendment law at all, but rather is based on a prudential interest in federal-state comity and a concern for "Our Federalism."* The Eleventh Amendment, as does Article III, speaks in terms of "judicial power." The question that must therefore animate the inquiry in any actual Eleventh

> Amendment case is whether the federal court has power to entertain the suit. In cases in which there is no such power, Congress cannot provide – even through a "clear statement." Many of this Court's decisions, however, purporting to apply the Eleventh Amendment, do not deal with judicial power at all. Instead, the issue of immunity is treated as a question of the proper role of the federal courts in the amalgam of federal-state relations. It is in these cases that congressional abrogation is appropriate.

491 U.S. at 23-25, 105 L.Ed. 2d at 22-23 (emphasis added).

Justice Stevens felt that the plain language of [sic] Eleventh Amendment did not apply and, therefore, that Congress did have the power to allow a damage remedy against the states under the circumstances. 491 U.S. at 28-29, 105 L.Ed. 2d at 25.

G. The Recognition that Congress Lacks the Power to Abrogate the States' Sovereign Immunity.

Seven years after the decision in *Union Gas*, the membership of the Supreme Court had changed significantly, and the stage was set for what would become the most important Eleventh Amendment/sovereign immunity case since *Hans, Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L.Ed. 252, 116 S.Ct. 1114 (1996).

In that case, the Seminole Tribe of Florida sued the State and its Governor for allegedly failing to negotiate in good faith concerning a gaming compact, as required by the Indian Gaming Regulatory Act (IGRA). Plaintiffs did not seek damages; rather they sought an injunction to require the State of Florida to negotiate a gaming compact

in good faith. Plaintiffs also sued the Governor of Florida, under *Ex Parte Young*, seeking a similar injunction.

The State of Florida argued that the Eleventh Amendment barred any action against it, in spite of the fact that the IGRA contained an explicit statement which purported to abrogate the State's Eleventh Amendment immunity. The IGRA had been passed pursuant to the Indian commerce clause (U.S. Const., Art. I, § 8, cl. 3), which gives Congress the power to "regulate Commerce . . . with Indian Tribes."

In shifting to a dramatic new direction in Eleventh Amendment jurisprudence, the *Seminole Tribe* Court overruled *Union Gas* and held that Congress, acting under Article I of the Constitution, simply does not have the power to abrogate a State's "Eleventh Amendment" immunity, no matter how clearly it expresses its desire to do so.

Chief Justice Rehnquist began the Court's analysis as follows:

> Although the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of federal courts, "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." . . . That presupposition, first observed over a century ago in [*Hans*], has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," . . . For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States "was

> not contemplated by the Constitution when establishing the judicial power of the United States."

517 U.S. at 54, 134 L.Ed. 2d at 265 (citations omitted).

The Court quickly concluded that the IGRA clearly expressed Congress' intent to abrogate the states' sovereign immunity. The Court then turned to the question whether the IGRA was passed "pursuant to a valid exercise of [congressional] power." Plaintiffs apparently had argued that this issue should be viewed with some "charity" by the Court, because they were seeking only prospective injunctive relief. In response, the Court stated as follows:

> Petitioner suggests that one consideration weighing in favor of finding the power to abrogate here is that the Act authorizes only prospective injunctive relief rather than retroactive monetary relief. But we have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment. . . . We think it follows *a fortiori* from this proposition that the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to "preven[t] a federal court judgment that must be paid out of a State's treasury . . . ; it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties. . . . "

517 U.S. at 58, 134 L.Ed. 2d at 267 (citations omitted).

The *Seminole Tribe* Court continued its analysis by noting that the Court had upheld Congressional abrogation of the States' sovereign immunity only in two situations: (1) cases in which Congress had acted pursuant to § 5 of the Fourteenth Amendment[11] and (2) one case, *Pennsylvania v. Union Gas Co., supra*, in which Congress had acted under the Interstate Commerce Clause. 517 U.S. at 59, 134 L.Ed. 2d at 268. The Court found that no "principled distinction" could be drawn between the Indian Commerce Clause and the Interstate Commerce Clause. After discussing the fact that the decision in *Union Gas* was a plurality decision, that it was a "deeply fractured decision," that it "essentially eviscerated our decision in *Hans*," and that it had "proved to be a solitary departure from established law," the Court specifically overruled *Union Gas*. 517 U.S. at 64-66, 134 L.Ed. 2d at 271-73.

Next, the *Seminole Tribe* Court gave a show of support to *Hans* and its interpretation of the Eleventh Amendment:

> The dissent mischaracterizes the *Hans* opinion. That decision found its roots not solely in the common law of England, but in the much more fundamental "jurisprudence in all civilized nations."
>
> . . .
>
> The dissent's lengthy analysis of the text of the Eleventh amendment is directed at a straw man

[11] Section 5 of the Fourteenth Amendment provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

> – we long have recognized that blind reliance upon the text of the Eleventh Amendment is "to strain the Constitution and the law to a construction never imagined or dreamed of." . . . The text dealt in terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the federal courts did not have federal question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.

517 U.S. at 69-70, 134 L.Ed. 2d at 275.[12]

After finding that Plaintiffs' claims against the State of Florida were barred by the Eleventh Amendment, the Court proceeded to analyze Plaintiffs' claims for injunctive

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[12] As discussed above, the rationale of *Hans* rests in large part upon the assumption that, if the federal courts had been able to exercise general federal question jurisdiction at the time the Eleventh Amendment was written, the Amendment would have specifically prohibited a citizen from suing his own state. *See* discussion at note 6, *supra*. The *Seminole Tribe* Court's statement that not "much thought" was given to this point seemingly indicates that *Hans* rests upon a faulty assumption.

This statement on the part of the majority, however, was seriously challenged by Justice Souter in his dissent, wherein he noted that the first post-*Chisholm* draft of the Eleventh Amendment basically provided that "no state" could be "made a party defendant" in any federal court in a suit brought by "any person or persons." 517 U.S. at 110-111, 134 L.Ed. 2d at 300-301. He noted that Congress took no action on that draft, and he concluded that "the Amendment as ultimately adopted two years later could hardly have been meant to limit federal-question jurisdiction, or it would never have left the States open to federal-question suits by their own citizens." 517 U.S. at 112, 134 L.Ed. at 301.

relief against the Governor of Florida, brought under *Ex Parte Young*. In doing so, the court announced another significant restriction of the *Ex Parte Young* doctrine. The Court found that Congress had crafted an "intricate remedial scheme" in the IGRA. In considering this remedial scheme (which the Court had just held could not be enforced against the State of Florida because it violated the Eleventh Amendment), the Court noted that the sanctions set forth therein were "quite modest," when compared with the "more complete and more immediate relief [that] would be available under *Ex Parte Young*." 517 U.S. at 75, 134 L.Ed. 2d at 278-79. The Court took this fact as an indication that Congress, in providing for only "modest" relief in the IGRA, did not wish to allow a "more complete" remedy under *Ex Parte Young*. Therefore, despite the fact that Plaintiff could not enforce the IGRA remedies, the Court held that Plaintiff could not maintain an action against the Governor of Florida under *Ex Parte Young*. *Id.*

While four Justices wrote approximately 70 pages of dissent in *Seminole Tribe*, those views are now clearly the minority opinion, and they will not be discussed herein.

H. The Application of the Doctrine of Sovereign Immunity to Federal Claims Brought in State Court and Further Expansion of the Doctrine.

In the wake of *Seminole Tribe*, the following results were quite clear. First, the "Eleventh Amendment" prohibited Plaintiffs' lawsuit for injunctive relief against the State of Florida. Regardless of its expressed intent, Congress simply lacked the power, when legislating under Article I, to override a state's sovereign immunity. Second, Plaintiffs could not maintain an *Ex Parte Young* action

against the Governor of Florida even for prospective injunctive relief. Thus, it seemed that Congress had created a federal right in favor of Plaintiffs, but Plaintiffs had no federal forum in which to attempt to vindicate that right. The possibility remained open, however, that future plaintiffs could sue a state in state court, where the eleventh Amendment would not apply.

That door was shut some three years later with the Supreme Court's decision in *Alden v. Maine*, 527 U.S. ___, 144 L.Ed. 2d 636 (1999). In *Alden*, a group of state employees had sued the State of Maine in federal court for alleged violations of the overtime provisions of the Fair Labor Standards Act (FLSA). While that lawsuit was pending, the Supreme Court decided *Seminole Tribe*.

Applying *Seminole Tribe*, the federal district court had dismissed Plaintiffs' FLSA claims, which dismissal was affirmed by the First Circuit. Because Plaintiffs were seeking money damages, they could not bring an *Ex Parte Young* action. Therefore, they tried the only route that was left open following *Seminole Tribe* – they filed suit in state court alleging a violation of the FLSA. The state trial court dismissed the lawsuit on the basis of sovereign immunity. The Supreme Judicial Court of Maine affirmed that decision.

The U.S. Supreme Court granted certiorari and affirmed. Because the broad and sweeping language set forth in *Alden* bears directly on the issue at hand, the Court believes it appropriate to quote extensively from that decision. The *Alden* Court began its analysis as follows:

> The Eleventh Amendment makes explicit reference to the States' immunity from suits

"commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." . . . We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." *The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh amendment.* Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, *the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today* (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "specifically recognizes the States as sovereign entities." . . . Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. . . . The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment which, like the other provisions of the Bill of Rights, was enacted to allay

> lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
>
> . . .
>
> The federal system established by our Constitution preserves the sovereign status of the States in two ways. *First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.* The States "form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."
>
> . . .
>
> *The States thus retain "a residuary and inviolable sovereignty."* . . . They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

527 U.S. at ___, 144 L.Ed. 2d at 652-53.

. . .

> The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," . . ., and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice

Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution. . . . *In accordance with this understanding, we have recognized a "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution – anomalous and unheard of when the Constitution was adopted." . . . As a consequence we have looked to "history and experience, and the established order of things," . . . rather than "adhering to the mere letter" of the Eleventh Amendment, . . . in determining the scope of the States' constitutional immunity from suit.*

. . .

[Our] holdings reflect a settled doctrinal understanding consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. . . . The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; *it follows that the scope of the States' immunity from suit is not demarcated by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.*

. . .

In this case we must determine whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts. As the foregoing discussion makes clear, the fact that the Eleventh Amendment by its terms limits only "the Judicial power of the United States" does not resolve the question. To rest on the words of the Amendment alone would

> be to engage in the type of a historical literalism we have rejected in interpreting the scope of the States' sovereign immunity since the discredited decision in *Chisholm*. . . .

527 U.S. at ___, 144 L.Ed. 2d at 661-63 (citations omitted).

The four dissenters in *Alden* relied upon the Supremacy Clause, U.S. Const., Art. VI, for the proposition that, when Congress enacts legislation subjecting the states to suit, such legislation necessarily overrides the states' sovereign immunity. The dissent also relied heavily on the fact that the Eleventh Amendment speaks only to the "judicial power of the United States," and, thus, it cannot possibly be applicable to an action filed in state court by an individual seeking to vindicate a federal right.

The majority responded to the first point with an argument somewhat akin to the reasoning of *Ex Parte Young* that, when Congress enacts laws that do not "accord with the constitutional design" (*i.e.*, the constitutional design including the "implicit" concept of the States' sovereign immunity), the Supremacy Clause simply cannot apply. The *Alden* Court continued as follows:

> The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power. . . . We reject any contention that substantive federal law by its own force necessarily overrides the sovereign immunity of the States. *When a State asserts its immunity to suit, the question is not the primacy of federal law but the implementation of the law in*

> *a manner consistent with the constitutional sovereignty of the States.*

527 U.S. at ___, 144 L.Ed. 2d at 664.

> There are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state courts. . . . This, of course, is a truism as to the literal terms of the Eleventh Amendment. *As we have explained, however, the bare text of the Amendment is not an exhaustive description of the States' constitutional immunity from suit.* The cases, furthermore, do not decide the question presented here – whether the States retain immunity from private suits in their own courts notwithstanding an attempted abrogation by the Congress.

527 U.S. at ___, 144 L.Ed. 2d at 666 (citations omitted).

Following sixteen pages of discussion, the majority in *Alden* reached the conclusion that the question whether Congress had the authority under Article I to abrogate a State's immunity from suit in its own courts was "a question of first impression." 527 U.S. at ___, 144 L.Ed. 2d at 670. In order to answer this question, the *Alden* majority looked not to the Eleventh Amendment, but to "history, practice, precedent, and the structure of the Constitution." *Id.*

Petitioners had also argued that, because the Eleventh Amendment focused on the states' immunity from suit in federal court, there was no instruction in the historical record regarding the founders' intent to preserve the states' immunity from sit in their own courts. Once again, returning to the logic inherent in *Hans*, the *Alden* Court stated that the founders' silence on this point was "best explained by the simple fact that no one, not even

the Constitution's most ardent opponents, suggested the document might strip the States of *the immunity*." 527 U.S. at ___, 144 L.Ed. 2d at 670 (emphasis added). The Court found that, "the silence . . . suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution." *Id.*

The Court next noted, with apparent approval, that its decisions had "often described the States' immunity *in sweeping terms*. . . ." 527 U.S. at ___, 144 L.Ed. 2d at 672 (emphasis added). After discussing some of these cases, the *Alden* Court summed up as follows:

> As it is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court . . . our decisions suggesting that the States retain an analogous constitutional immunity from private suits in their own courts support the conclusion that Congress lacks the Article I power to subject the States to private suits in those fora."

527 U.S. at ___, 144 L.Ed. 2d at 674.

The majority next questioned whether "a congressional power to subject nonconsenting Stats to private suits in their own courts is consistent with the structure of the Constitution." *Id.* In answering this question, the *Alden* Court looked "to the essential principles of federalism and to the special role of the State Courts in the constitutional design." *Id.* The Court stated as follows:

> Although the Constitution grants broad powers to Congress, *our federalism requires that*

> *Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in governance of the Nation.* . . . The principle of sovereign immunity preserved by constitutional design "thus accords the States the respect owed them as members of the federation." [*citing in part Idaho v. Coeur d'Alene Tribe*, 512 U.S. at 268, 138 L.Ed. 2d at 447, which had recognized "the dignity and respect afforded a State, which the immunity is designed to protect"].
>
> Petitioners contend that immunity from suit in federal courts suffices to preserve the dignity of the State. *Private suits against nonconsenting States, however, present "the indignity of subjecting a State to the coercive processes of judicial tribunals at the instance of private parties," . . . regardless of the forum.*

527 U.S. at ___, 144 L.Ed. 2d at 674-75 (emphasis added).

Finally, the *Alden* majority apparently felt it necessary to address the consequences of its decision, as well as those of other recent sovereign immunity cases, which had now made it clear that an individual cannot sue a state for damages to vindicate a federal right in either federal court or state court. As the *Hans* Court had done, the *Alden* Court first emphasized the apparent hope that no citizen would ever need to sue a state.[13] The Court said:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not

[13] Obviously, that same hope which had been addressed in *Hans* more than 100 years earlier had proven to be vain.

> confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. *We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.* The good faith of the States thus provides an important assurance that [t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI.

527 U.S. at ___, 144 L.Ed. 2d at 678-79 (emphasis added).

But, in those presumably rare situations in which a citizen's federal rights are somehow subverted in spite of the states' good faith, the *Alden* Court recognized that individuals attempting to sue states are not completely without remedies. First, a state might consent to be sued.[14] Second, even the sweeping amorphous concept of state sovereign immunity inherent in the Constitution does not prevent the federal government from suing a state.[15]

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[14] Numerous commentators, as well as several Justices of the Supreme Court, have noted that the "consent" theory is completely inconsistent with the plain language of the Eleventh Amendment. *See, e.g.*, Pfander, supra n.2 at 1373-78; *Union Gas, supra*, 491 U.S. at 25-26, 105 L.Ed. 2d at 23-24 (Stevens, J. concurring). It is well-settled that the federal courts are courts of limited jurisdiction, and that the parties to a lawsuit cannot waive a lack of subject matter jurisdiction. Thus, if the Eleventh Amendment restricts the "judicial power of the United States," as it plainly does how can a state "waive" its sovereign immunity, and thereby give a federal court jurisdiction that it does not have?

[15] The Fifth Circuit, however, has recently held that the doctrine of sovereign immunity bars a lawsuit by a federal *agency* filed against a

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Third, the states enjoy no sovereign immunity under federal statutes enacted by Congress as "appropriate legislation" to enforce the Fourteenth Amendment.[16]

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state in federal court. *See Matter of Estate of Fernandez*, 123 F.3d 241, 245-46 (5th Cir. 1997) (holding that the FDIC, as an agency of the national government, "does not enjoy the status accorded the national government for Eleventh Amendment purposes," although recognizing the possibility that Congress might "abrogate the Eleventh Amendment in the grant of agency status for the purpose of jurisdiction").

[16] While it is well beyond the scope of this Report and Recommendation, the Court notes that the Supreme Court has continued to take an expansive view of the doctrine of sovereign immunity even in situations where Congress unquestionably has the power, acting under Section 5 of the Fourteenth Amendment, to abrogate a state's immunity from suit. Thus, the Court has required Congress to unequivocally express its intent to abrogate the states' sovereign immunity in whatever legislation may be at issue. *See Kimel Florida Board of Regents*, ___ U.S. ___, 120 S.Ct. 631, 640 (2000).

Even in cases where Congress makes it explicit that it is acting pursuant to its Section 5 powers and that it wishes to subject the states to suit, the Court will question whether the legislation at issue is "appropriate" legislation to enforce rights guaranteed by the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 138 L.Ed. 2d 624, 117 S.Ct. 2157 (1997). *Flores* held that, while Congress has the power to "enforce" the provisions of the Fourteenth Amendment, Congress cannot do so by "changing what the right is." In other words, while Congress can enact appropriate "remedial" legislation under the Fourteenth Amendment, it cannot effect a substantive redefinition of the Fourteenth Amendment right at issue. In making the determination as to which of these Congress has done, the court looks to whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." 521 U.S. at 520, 117 S.Ct. at 2157. *See also Kimel, supra*. If there is not, the legislation is not "appropriate" and the doctrine of sovereign immunity applies. For example, in *Florida Prepaid Postsecondary Education Expenses Board v. College Savings Bank*, 527 U.S. at ___, 144 L.Ed. 2d 575 (1999), the Court ruled that the Plaintiff could not sue the State of Florida for patent infringement, because the Act purporting to allow such lawsuits was not "appropriate" legislation enacted to enforce the

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Fourth, sovereign immunity does not bar suits against "lesser entities" than states (*i.e.* municipal corporations or other governmental entities which are not arms of the state). Fifth, suits can be brought under *Ex Parte Young* for declaratory or injunctive relief, or even suits for money damages against state officers can be brought "so long as the relief is sought not from the state treasury but from the officer personally." 527 U.S. at ___, 144 L.Ed. 2d at 679-80.

The same day that *Alden* was decided, the Supreme Court decided another case worthy of note. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. at ___, 144 L.Ed. 2d 605 (1999), the Court confirmed that Congress, acting pursuant to its Article I powers over copyrights and patents, could not abrogate a State's sovereign immunity. Plaintiff had sued the State of Florida under the Lanham Act, as amended (15 U.S.C. § 1125(a)) for false misrepresentation of Plaintiff's product. Plaintiff and the State were selling similar products, in competition with each other. Plaintiff argued that the State had constructively waived its immunity from suit, relying on *Parden*. After referring to *Parden* as "an elliptical opinion that stands at the nadir of our waiver (and, for that matter, sovereign immunity) jurisprudence," the *College Savings Bank* Court specifically overruled *Parden*. 527 U.S. at ___, 144 L.Ed. 2d at 617, 619.

Fourteenth Amendment. While Congress had stated that it was acting, at least in part, under Section 5 of the Fourteenth Amendment in passing the Patent Remedy Act, Congress had not identified conduct transgressing the Fourteenth Amendment's substantive provisions nor had it tailored its legislative scheme to remedying or preventing such conduct. 527 U.S. at ___, 144 L.Ed. 2d at 588.

III. Application of the Doctrine of Sovereign Immunity to the Case at Bar

The above discussion shows that the concept of sovereign immunity is extremely broad, amorphous and virtually unlimited, with the possible exception of the five specific instances mentioned in *Alden*. Two guiding principles, however, are readily apparent.

First, there is absolutely no question that the doctrine of sovereign immunity is not limited by the language of the Eleventh Amendment. Thus, Defendants' arguments that the doctrine is inapplicable in the case at bar because this is not a "suit" or a situation that involves the "judicial power of the United States" are unavailing.

Second, it cannot be questioned that the Supreme Court has taken an expansive view of the doctrine of sovereign immunity in recent years, while restricting the major, previously-recognized "exceptions" to it.

It is certainly not the province of this Court to question the holdings of the United States Supreme Court. The appropriate questions have already been raised quite eloquently in the dissenting opinions in *Atascadero, Pennhurst II, Welch, Seminole Tribe,* and *Alden*. As Justice Frankfurter once observed:

> Whether [sovereign] immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, . . . it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief,

> express [sic] nearly fifty years ago that, "it is a wholesome sight to see 'the Crown' sued and answering for its torts."

See Great Northern Life Insurance Company v. Read, 322 U.S. at 59, 88 L.Ed. at 1129 (1944) (Frankfurter J., dissenting) (citation omitted).

Nevertheless, as the Sixth Circuit has stated, it is the duty of the lower courts to follow Supreme Court precedent, whether they agree with it or not. *See, e.g., McNeilus Truck and Manufacturing Co. v. State of Ohio*, 226 F.3d 429, 438 (6th Cir. 2000).

As discussed above, the case at bar is one of first impression. This Court must be guided not only by the language of the Supreme Court decisions discussed above but also by the principles implicit in those decisions.

The Court must conclude that the doctrine of sovereign immunity bars the administrative proceeding at issue, and that the State has not consented to that proceeding.[17] It is undisputed that Congress was acting

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[17] The State did not raise its sovereign immunity in its initial filing before the Secretary. Administrative Record (hereinafter "AR") at 129-39. In fact, the State did not raise its sovereign immunity until after the Secretary had issued his decision, when the State filed a "Motion for Stay" of that decision. AR at 197-98. This fact, however, is of no consequence, because the Supreme Court has held that the defense of sovereign immunity is so important that it can be raised at any stage of the proceedings, even when a case is on review before the Supreme Court itself. *See Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466-67, 89 L.Ed. 389, 395-96, 65 S.Ct. 347 (1945). Additionally, the Sixth Circuit has recently dismissed a case on the basis of a Defendant's sovereign immunity, even though Defendant had never raised

(Continued on following page)

pursuant to its powers under the Commerce Clause when it enacted the Hazardous Materials Transportation Act. Under *Seminole Tribe* and *Alden*, Congress plainly could not have included a provision in the Act that would have allowed the Association to file suit against the State of Tennessee in either federal court or state court, even if the Association were seeking only declaratory and prospective injunctive relief. As the *Seminole Tribe* Court stated, "[W]e have often made it clear the relief sought by a plaintiff suing a Sate is irrelevant to the question whether the suit is barred by the Eleventh Amendment." 517 U.S. at 58, 134 L.Ed. 2d at 267. The question, therefore, becomes whether Congress had the power to establish a procedure that allows an individual to force a state to defend itself and one of its regulations in a federal administrative forum. Based upon the above authorities, the court believes that Congress does not have that power either.

The Court must follow the principles of *Coeur d'Alene* that sovereign immunity is designed to protect "the dignity and respect afforded a State." 512 U.S. at 268, 138 L.Ed. 2d at 447. As *Allen* stated, "Our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in governance of the Nation." 527 U.S. at ___, 144 L.Ed. 2d at 674. As *Alden* further stated, "Private suits against nonconsenting states . . . present 'the indignity of subjecting a State to the coercive processes of judicial tribunals at the instance of private parties,' . . . *regardless of the forum*." 527 U.S. at ___, 144 L.Ed. 2d at 675.

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the issue. *See Reese v. State of Michigan,* 2000 U.S. App. LEXIS 27404 (6th Cir. 2000) (Not for Publication).

The Department of Transportation argues that the State is not forced to do anything under § 5125(d). The reality of the situation however, is that the State must "appear" and must contest the application. If it does not do so, it is not a "party" under § 5125(f), and it cannot seek judicial review of the decision under that subsection. Theoretically, a state might choose not to participate in the administrative proceeding and might thereafter attempt to challenge the "final administrative determination" of the Associate Administrator by filing its own action in court. In such a case, the Department of Transportation would no doubt argue that the state had waived its right to contest the determination by not participating in the administrative proceeding and that the state could not seek judicial review of its determination under subsection (f) or otherwise. Presumably very few states would be willing to take the risk that a court might agree.

Moreover, subjecting the State of Tennessee to the "coercive processes" of the Department of Transportation, whose Associate Administrator has the authority to conduct "an investigation," a "hearing" or a "conference," the parameters of which are completely undefined, is a much greater insult to the State's "dignity," than subjecting the State to the processes of a "judicial tribunal" would be. At least if the State were before a court of law, the court would be bound by rules of procedure and rules of evidence. Additionally, a court of law would arguably be a more impartial forum than that presented by the U.S. Department of Transportation, which is being asked to determine whether the federal law it is charged with enforcing preempts the State's regulatory fee.

Before this Court, the Department of Transportation also attempts to take advantage of the "deference" that

arguably should be accorded his decision. The concept of a reviewing court giving deference to the decision of an administrative agency when the agency is acting within its sphere of expertise is a familiar one, and need not be discussed in detail here. But if this Court gives such deference to the Secretary's decision, the "dignity" of the State of Tennessee suffers much more than it otherwise would have suffered if the initial proceeding had been held before a court of law, because no such "deference" would have been given in that situation.

Respondents cite *Tennessee Department of Human Services v. United States Department of Education,* 979 F.2d 1162 (6th Cir. 1992), for the proposition that sovereign immunity does not apply in an Article I administrative process commenced by a private party. That case however, was decided in 1992, four years before the Supreme Court's decision in *Seminole Tribe*, and it rests in large part upon the rationale of *Union Gas, supra,* (*see* 979 F.2d at 1166), which was specifically overruled in *Seminole Tribe.*

IV. Recommendation

For the foregoing reasons, the undersigned concludes the doctrine of sovereign immunity bars the administrative proceeding at issue in this case. The undersigned, therefore, recommends that the decision of the Secretary be vacated, that Petitioners' motion be granted in part, and that this matter be dismissed.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District

Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed in this Report in which to file any response to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed 2d 435 (1985) *reh'g denied*, 474 U.S. 1111 (1986).

/s/ E. Clifton Knowles
E. Clifton Knowles
United States
Magistrate Judge

APPENDIX D

[LOGO]
U.S. Department of Transportation

Research and Special Programs Administration

400 Seventh St., S.W.
Washington, D.C. 20590

Alan M. Leiserson, Esq.
Legal Services Director
Tennessee Department of
Environment and Conservation
Office of General Counsel
Seventh Floor, Tennessee Tower
312 Eighth Avenue, North
Nashville, TN 37243-1548

Docket No. RSPA 98-3665-15 (PD-21(R))
Tennessee Hazardous Waste Requirements

Dear Mr. Leiserson:

The request of the Tennessee Department of Environment and Conservation (DEC) for a "stay" of Preemption Determination (PD) No. 21(R), published in the *Federal Register* at 64 Fed. Reg. 54474, on October 6, 1999, is denied for the reasons set forth below.

According to DEC's "motion" paper, its request only applies to the ruling in PD-21(R) that Federal hazardous material transportation law preempts DEC's annual $650 remedial action fee imposed on all transporters who pick up or deliver hazardous waste within Tennessee. DEC indicates that it is not requesting a stay of that part of PD-21(R) which found that 49 U.S.C. § 5125(b)(1)(D) preempts DEC's written incident notification requirement in DEC Rule 1200-1-11-.04(4)(a)(4). DEC also states that the latter

requirement was amended effective July 19, 1999, but DEC has not submitted the text of its amended requirement to the docket in this proceeding or otherwise provided it to the Research and Special Programs Administration (RSPA).

Neither DEC nor any other person filed a petition for reconsideration of PD-21(R) within 20 days of publication in the *Federal Register*, as allowed by 49 C.F.R. § 107.211(a). As indicated in PD-21(R), because no petition for reconsideration was filed within the time allowed, the October 6, 1999 determination became RSPA's final decision on October 26, 1999. 64 Fed. Reg. at 54481. The filing of a petition for reconsideration is not a prerequisite for seeking judicial review under 49 U.S.C. § 5125(f). *Id.*

DEC observes that RSPA has no rules for staying administrative determinations of preemption. It states that its request is based on the provision in the Administrative Procedure Act that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. In its paper, DEC addresses the following four factors:

1. the likelihood that DEC will prevail on the merits of a suit for review of PD-21(R);
2. the likelihood that DEC will be irreparably harmed absent a stay;
3. the prospect that others will be harmed if a stay is granted; and
4. the public interest in granting the stay.

The Court of Appeals for the District of Columbia Circuit has held that these factors should be considered in determining whether a judicial stay is warranted. *Cuomo v.*

U.S. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). I have considered DEC's request under the four factors set forth in the *Cuomo* case without deciding that 5 U.S.C. § 705 applies to PD-21(R) or that the *Cuomo* factors apply to an administrative agency's exercise of discretion to stay its own decision.

Likelihood of success. DEC makes two arguments with respect to the likelihood that it will prevail in a civil action to reverse PD-21(R). It asserts that the Department of Transportation lacked "subject matter jurisdiction" to issue PD-21(R) under recent decisions of the U.S. Supreme Court regarding the "sovereign immunity" of a State against a private suit in a Federal court or the State's own courts. DEC also claims that RSPA misinterpreted the applicable statute, 49 U.S.C. § 5125(g)(1), "misused" the applicable precedents, and "failed to adequately address the facts . . . or the applicable case law."

DEC has not previously asserted "sovereign immunity" as a reason why RSPA may not make administrative determinations of preemption under 49 U.S.C. § 5125(d)(1). Rather, DEC submitted comments in May and July 1998, and it specifically requested an opportunity to further respond to rebuttal comments, without raising sovereign immunity issues. Most importantly, DEC has not explained how the recent Supreme Court decisions apply to a Federal agency's administrative determination, such as PD-21(R), that Federal law preempts an inconsistent State requirement – or how that doctrine affects judicial review of PD-21(R) in Federal court when a State sues an agency of the United States (and not a private party) as the opposing party litigant.

A State may not wilfully ignore a valid Federal law that contains express preemption provisions. The Supreme Court made clear in *Alden v. Maine*, 119 S.Ct. 2240, 2266 (1999), that a State's privilege to assert sovereign immunity against private suits

> does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design.

DEC has not shown that the recent Supreme Court decisions directly apply to PD-21(R) or make it likely that RSPA's determination in PD-21(R) will be reversed.

The determination in PD-21(R) specifically addressed each of the substantive arguments raised by DEC in its comments, including those related to the current balance in the remedial action fund (which DEC has never precisely specified); the Supreme Court's construction of the Commerce Clause of the Constitution and decisions of Federal courts of appeals concerning the fees charged for performing annual safety inspections (which DEC does not perform); and DEC's use (or nonuse) of the funds collected from transporters of hazardous waste. DEC's complaints of error do not show that RSPA misapplied either the law or facts in deciding PD-21(R) or that there is any likelihood that PD-21(R) will be reversed on the merits.

Irreparable Injury. DEC argues that, if it stops collecting fees from transporters of hazardous waste, it will "lose a portion of its ability to protect the public and the environment." DEC also claims that there would be "confusion and disruption of the regulatory program" if it stopped

collecting these fees and then resumed collections (assuming a reversal of PD-21(R)).

DEC has not explained why it cannot fund a program for responding to transportation incidents involving hazardous waste with a fee that is "fair" and used for purposes "related to transporting hazardous material" as required by 49 U.S.C. § 5125(g)(1). Nor has it made any showing that the current balance in the remedial action fund is not sufficient to cover potential expenses during the period for judicial review of PD-21(R). Included in the comments previously submitted by DEC was information that the State of Tennessee annually appropriates $1 million to the remedial action fund, which dwarfs the approximately $170,000 collected from transporters each year. The applicant in PD-21(R) estimated that DEC had collected more than $500,000 from transporters up through the end of 1997, and DEC also stated that the balance in the fund has never been below $170,000 in recent years. Yet DEC identified only $15,000 in expenditures from the remedial action fund to clean up highway and rail incidents. Even assuming that $15,000 were an annual expense, rather than the total since the remedial action fund was created, it is impossible to conclude that DEC's capability for emergency response would be substantially impaired by a refusal to stay PD-21(R) during judicial review.

I also cannot find that a potential difficulty in collecting fees from transporters constitutes irreparable injury, even if PD-21(R) is reversed and DEC then seeks to collect fees from hazardous waste transporters covering the period of judicial review. In an analogous situation, the Federal Energy Regulatory Commission refused to stay its order that a utility make refunds to its customers, stating that

> The possibility that the utility might experience difficulty in recouping refunds from its wholesale customers does not constitute irreparable injury. . . . Further, the utility has not shown that the customers will suffer little, if any, harm by delaying the payments of refunds. We believe that the public interest supports the rapid disbursement of refunds.

Ohio Power Co., 43 FERC § 61,046 (1988) (internal citation and footnote omitted).

Harm to others. DEC argues that requiring hazardous waste transporters to continue to pay the $650 annual remedial action fee, pending judicial review of PD-21(R), will have a "relatively small monetary impact" on them. In doing so, DEC acknowledges that each hazardous waste transporter would suffer some actual injury. By itself, this is sufficient to find that other parties will be harmed by a stay of PD-21(R). Indeed, the payment of $650 may have a substantial impact on a small transporter.

Public interest. To support its claim that "the public interest is on [its] side," DEC simply repeats its earlier arguments of "confusion among the regulated community and the diminished capacity to respond to hazardous substance sites." It does not further explain how the public interest would be advanced by a preservation of the status quo, whereby hazardous waste transporters are charged $650 that is simply placed in the remedial action fund and not actually "used for purpose relating to transporting hazardous material," as required by 49 U.S.C. § 5125(g)(1).

For the reasons already stated, DEC has not shown that it will suffer harm from foregoing collection of $170,000 per year from hazardous waste transporters. To the extent

that DEC needs to collect fees from transporters, it may design an alternative program that satisfies the requirements of § 5125(g)(1). Therefore, I cannot conclude that a stay of RSPA's determination in PD-21(R) is in the public interest.

I am denying DEC's request for a stay because I cannot find that it has satisfied any of the four factors to be considered.

Sincerely,

/s/ Alan I. Roberts

Alan I. Roberts
Associate Administrator for
Hazardous Materials Safety

cc: Mr. Michael Carney (AWHMT)
Mr. Jonathan Collom (HMAC)
Michael J. Rush, Esq. (AAR)

APPENDIX E

54474 6532/Federal Register/Vol. 64, No. 193/
Wednesday, October 6, 1999/Notices

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA-98-3665]

Preemption Determination No. 21(R); Tennessee Hazardous Waste Transporter Fee and Reporting Requirements

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Notice of administrative determination of preemption by RSPA's Associate Administrator for Hazardous Materials Safety.

Applicant: Association of Waste Hazardous Materials Transporters (AWHMT).

Local Laws Affected: Tennessee Code 68-212-203(a)(6); Tennessee Rules and Regulations 1200-1-11-.04(4)(a)4, 1200-1-13-.03(1)(e).

Modes Affected: Highway and Rail.

SUMMARY: Federal hazardous material transportation law preempts Tennessee's requirement for hazardous waste transporters to pay a $650 per year remedial action fee because that fee is not fair and it is not used for purposes related to transporting hazardous material. Federal hazardous material transportation law also preempts Tennessee's requirement for a transporter to submit a

written report of a discharge of hazardous waste during transportation because that requirement is not substantively the same as RSPA's requirement in the Hazardous Materials Regulations.

FOR FURTHER INFORMATION CONTACT: Frazer C. Hilder, Office of the Chief Counsel, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001 (Tel. No. 202-366-4400).

SUPPLEMENTARY INFORMATION:

I. Background

In March 1998, AWHMT applied for a determination that Federal hazardous material transportation law preempts Tennessee statutory and regulatory requirements that transporters of hazardous waste pay a remedial action fee and file written reports of any discharge of hazardous waste within the State.

Tennessee requires a transporter to hold a permit in order to pick up or deliver hazardous waste within the State. Tennessee Code 68-212-108(a)(1); Rule 1200-1-11-.04(2) of the Tennessee Department of Environment and Conservation (DEC). In addition to the initial application and annual renewal fees to obtain this permit, which are not challenged by AWHMT, the transporter must also pay a $650 "remedial action fee" each year, under Tennessee Code 68-212-203(a)(6) and DEC Rule 1200-1-13.03(1)(e). (This fee had been set at $550 for the 1994-95 fiscal year and $600 for the 1995-96 fiscal year. *Id.*) The remedial action fees paid by transporters are deposited into a "special agency account . . . known as the 'hazardous waste remedial action fund.'" Tennessee Code 68-212-204(a). The

monies in this fund may be used for a number of purposes, including identifying, investigating, cleaning up and monitoring "inactive hazardous substance sites"; matching funds provided by the United States to clean up hazardous substance sites; providing on-site technical assistance to hazardous waste generators; taking additional measures to reduce the generation of hazardous waste within the State; and preparing an annual report to the Tennessee Legislature. Tennessee Code 68-212-205.

Tennessee also requires a transporter to submit to DEC, "[w]ithin fifteen days of occurrence," a written report "on each hazardous waste discharge during transportation that occurs in the state." DEC Rule 1200-1-11-.04(4)(a)4. The Note to this section states that a copy of DOT form F 5800.1, as required by 49 CFR 171.16, "shall suffice for this report provided that it is properly completed and supplemented as necessary to include the information required" in subsection (a)3 with respect to immediate notification of any discharge of hazardous waste.

AWHMT contends that Tennessee's remedial action fee is preempted because the proceeds are not used exclusively for purposes related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response. AWHMT also maintains that this is a "flat fee" that is preempted because it has no relation to the transporter's operations within the State. In addition, AWHMT argues that Tennessee's requirement to submit written reports of any hazardous waste discharge is preempted because it is not substantively the same as DOT's requirements in 49 CFR 171.16.

The text of AWHMT's application was published in the **Federal Register**, and interested parties were invited to submit comments. 63 FR 17479 (April 9, 1998), correction, 63 FR 18964 (April 16, 1998). Comments were submitted by DEC, the Association of American Railroads (AAR), and the Hazardous Materials Advisory Council (HMAC). Rebuttal comments were submitted by AWHMT, DEC, and AAR. In its rebuttal comments, DEC asked RSPA to reopen the comment period to allow commenters to respond to rebuttal comments. RSPA denied that request but called DEC's attention to RSPA's procedural regulations providing that "Late-filed comments are considered so far as practicable." 49 CFR 107.205(c). Accordingly, in the event that a commenter raises a new issue in rebuttal comments, or there is a change in the facts or law involved in a preemption application, an interested party may always bring these matters to RSPA's attention. No late-filed comments were received.

II. Federal Preemption

The Hazardous Materials Transportation Act (HMTA) was enacted in 1975 to give the Department of Transportation greater authority "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce." Pub. L. 93-633 § 102, 88 Stat. 2156, presently codified as revised in 49 U.S.C. 5101. The HMTA "replace[d] a patchwork of state and federal laws and regulations * * * with a scheme of uniform, national regulations." *Southern Pac. Transp. Co. v. Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1980). On July 5, 1994, the HMTA was among the many Federal laws relating to transportation that were revised, codified and enacted "without substantive change"

by Public Law 103-272, 108 Stat. 745. The Federal hazardous material transportation law is now found in 49 U.S.C. Chapter 51.

The HMR are currently issued under the direction in 49 U.S.C. 5103(b)(1) that DOT "shall prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce." The term "hazardous material" specifically includes hazardous wastes. 49 CFR 171.8; *see also* § 171.1(a)(1).

A statutory provision for Federal preemption was central to the HMTA. In 1974, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." S. Rep. No. 1102, 93rd Cong. 2nd Sess. 37 (1974). More recently, a Federal Court of Appeals found that uniformity was the "linchpin" in the design of the HMTA, including the 1990 amendments that expanded the preemption provisions. *Colorado Pub. Util. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

The 1990 amendments to the HMTA codified the "dual compliance" and "obstacle" criteria that RSPA had applied in issuing inconsistency rulings before 1990.[1] The dual

[1] While advisory in nature, RSPA's inconsistency rulings were "an alternative to litigation for a determination of the relationship of Federal and State or local requirements" and also a possible "basis for an application * * * [for] a waiver of preemption." Inconsistency Ruling (IR) No. 2, Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Liquefied Propane Gas, etc., 44 FR 75566, 76657 (Dec. 20, 1979).

compliance and obstacle criteria are based on U.S. Supreme Court decisions on preemption. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Ray v. Atlantic Richfield, Inc.*, 435 U.S. 151 (1978). As now set forth in 49 U.S.C. 5125(a), these criteria provide that, in the absence of a waiver of preemption by DOT under 49 U.S.C. 5125(e) or unless it is authorized by another Federal law, "a requirement of a State, political subdivision of a State, or Indian tribe" is explicitly preempted if

> (1) complying with a requirement of the State, political subdivision or tribe and a requirement of this chapter or a regulation issued under this chapter is not possible; or
>
> (2) the requirement of the State, political subdivision, or Indian tribe, as applied or enforced, is an obstacle to the accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

In the 1990 amendments to the HMTA, Congress also added additional preemption provisions on certain "covered subject" areas and with regard to fees imposed by a State, political subdivision, or Indian tribe on the transportation of hazardous material. The covered subject areas include "the written notification, recording, and reporting of the unintentional release in transportation of hazardous material," 49 U.S.C. 5125(b)(1)(D); unless it is authorized by another Federal law or a DOT waiver of preemption, a non-Federal requirement on this subject matter is preempted when it is not "substantively the same as a provision of this chapter or a regulation prescribed under this chapter." 49 U.S.C. 5125(b)(1). RSPA has defined "substantively the same" to mean "conforms in every significant

respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted." 49 CFR 107.202(d).

In addition, 49 U.S.C. 5125(g)(1) provides that a State, political subdivision, or Indian tribe may

> impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose relating to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

Under 49 U.S.C. 5125(d)(1), any directly affected person may apply to the Secretary of Transportation for a determination whether a State, political subdivision or Indian tribe requirement is preempted. The Secretary of Transportation has delegated to RSPA the authority to make determinations of preemption, except for those concerning highway routing (which have been delegated to FHWA). 49 CFR 1.53(b). Under RSPA's regulations, preemption determinations are issued by RSPA's Associate Administrator for Hazardous Materials Safety. 49 CFR 107.209(a).

Section 5125(d)(1) requires that notice of an application for a preemption determination be published in the **Federal Register**. Following the receipt and consideration of written comments, RSPA will publish its determination in the **Federal Register**. *See* 49 CFR 107.209(d). A short period of time is allowed for filing petitions for reconsideration. 49 CFR 107.211. Any party to the proceeding may seek judicial review in a Federal district court. 49 U.S.C. 5125(f).

Preemption determinations do not directly address issues of preemption arising under the Commerce Clause of the Constitution, except that, as discussed in more detail in Section III.B.2., below, RSPA considers that Commerce Clause standards are relevant to a determination whether a fee related to the transportation of hazardous material is "fair" within the meaning of 49 U.S.C. 5125(g)(1). Preemption determinations also do not address statutes other than the Federal hazardous material transportation law unless it is necessary to do so in order to determine whether a requirement is authorized by another Federal law. A State, local or Indian tribe requirement is not authorized by another Federal law merely because it is not preempted by another Federal statute. *Colorado Pub. Util. Comm'n v. Harmon*, above, 951 F.2d at 1581 n.10.

In making preemption determinations under 49 U.S.C. 5125(d), RSPA is guided by the principles and policy set forth in Executive Order No. 12612, entitled "Federalism" (52 FR 41685, Oct. 30, 1987). Section 4(a) of that Executive Order authorizes preemption of State laws only when a statute contains an express preemption provision, there is other firm and palpable evidence of Congressional intent to preempt, or the exercise of State authority directly conflicts with the exercise of Federal authority.[2] Section 5125 contains express preemption

[2] On August 4, 1999, the President signed "Federalism" Executive Order No. 13132 which becomes effective on November 2, 1999. Although this replaces Executive Order No. 12612, it continues the policy that a Federal agency should find preemption "only where the [Federal] statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of

(Continued on following page)

provisions, which RSPA has implemented through its regulations.

III. Discussion

A. Standing

In its initial comments, DEC questioned whether AWHMT "has standing to pursue this petition." DEC asserted that AWHMT had not set forth sufficient facts in its application "to know if the Association has any members that have standing." DEC stated that its remedial action fee "does not apply to the universe of hazardous materials * * * but only to the subset of hazardous waste as defined by the Resource Conservation and Recovery Act (RCRA)," 42 U.S.C. 6901 *et seq.*, and that

> the fee only applies to persons who 'transport hazardous waste to or from locations within Tennessee.' TDEC Rule 1200-1-11-.04(2)(b)(1) in the Applicant's Attachment C. The fee does not apply to a transporter who passes through the State. [Footnote omitted]

With its rebuttal comments, AWHMT submitted affidavits of two of its members, Environmental Transport Group, Inc., of Flanders, New Jersey, and Tri-State Motor Transit Co., Inc., of Joplin, Missouri. Officials of each of these companies stated that their companies handled numerous shipments of hazardous waste every year that originate, terminate or are temporarily stored during the

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State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal Statute." Sec. 4(a), 54 FR 43255, 43257 (Aug. 10, 1999).

normal course of transportation in Tennessee. This is sufficient to allow AWHMT to petition for an administrative determination of preemption on behalf of its members. As stated in PD-2(R), Illinois Environmental Protection Agency's Uniform Hazardous Waste Manifest, 58 FR 11176, 11182 (Feb. 23, 1993),

> if [an association's] members do not comply with the IEPA Uniform Hazardous Waste Manifest requirements, they are subject to State enforcement action and to delays of their shipments. Thus, [the association's] members are "directly affected" by the Uniform Hazardous Waste Manifest system, and [the association] has standing to apply for this preemption determination.

Accord, PD-6(R), Michigan Marking Requirements for Vehicles Transporting Hazardous and Liquid Industrial Wastes, 59 FR 6186, 6189 (Feb. 9, 1994) (an association has standing to apply for a determination that Michigan requirements on the transportation of hazardous waste are preempted when its "members include those who transport hazardous waste in or through Michigan by motor vehicle").

RSPA finds that AWHMT has standing to apply for a determination that Federal hazardous materials transportation law preempts Tennessee requirements that apply to AWHMT's members that transport hazardous waste within Tennessee.

B. Remedial Action Fee

1. The Fee and its Uses

According to DEC, the remedial action fee mandated by Tennessee Code 68-212-203(a)(6) and DEC Rule

1200-1-13-.03(1)(e) is "part of the Tennessee superfund program." DEC stated that these fees are paid by generators of hazardous waste, transporters of hazardous waste, and facilities that treat or dispose of hazardous waste.[3] DEC indicated that its Division of Superfund collected more than $2.5 million in remedial action fees in 1996, and almost $2.9 million in 1997. In both years, more than 90% of the fees were paid by generators and treatment and disposal facilities; transporters paid $176,800 (about 7% of the fees collected) in 1996, and $168,700 (about 6%) in 1997.

DEC stated that the remedial action fees paid by generators, transporters and treatment and disposal facilities are credited to the Hazardous Waste Remedial Action Fund,[4] which is "distinct from the state general fund and any unencumbered balance does not revert to the general fund at the end of any fiscal year." DEC also advised that, besides these fees, the Hazardous Waste

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[3] It appears that the amount of fees paid by generators depends upon the amount of hazardous waste generated within the year. DEC Rule 1200-1-13-.03(1)(b). In addition, generators who ship hazardous waste offsite for treatment of disposal also pay an additional fee, also based on the amount of hazardous waste shipped. DEC Rule 1200-1-13-.03(1)(c). Although this additional "off-site shipping fee" may be a "fee related to transporting hazardous material," 49 U.S.C. 5125(g)(1), no directly affected person has asked RSPA to determine whether Federal hazardous material transportation law preempts this separate fee imposed on generators.

[4] Although DEC stated initially that this fund is "officially named the Hazardous Waste Remediation Fund," it later referred to the "Hazardous Waste Remedial Action Fund," which is the name specified in Tennessee Code 68-212-204.

Remediation Fund receives criminal fines and civil penalties for violations of the Tennessee Hazardous Waste Management Act, and the State appropriates $1 million to this fund each year. See Tennessee Code 68-212-203(d), (e).

DEC stated that "the primary use [of monies in the fund] is as a mechanism for the Department to investigate, contain and clean up 'inactive hazardous substance sites' * * * where disposal of hazardous substance has occurred." According to DEC, "hazardous substance" has the same meaning as in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 49 U.S.C. 9601(14), so that this term includes more than hazardous wastes.

DEC indicated that disposal can include "[a]ny spilling, discharge, or leaking such as can occur during an accident during transportation or during loading and unloading." DEC stated that it "accomplishes these activities through the use of contractors when the liable parties do not do it themselves." It indicated that it has separate contracts for emergency response, investigation and engineering, and for remediation. However, according to DEC, "[t]here has not been a major spill in a transportation-related incident that we have had to address with the superfund." It mentioned that, in 1996, it "used the fund and the emergency response contractor to address incidents on highways," at a total cost of $4,300. DEC also referred to two train derailments that resulted in the release of significant amounts of hazardous substances. It stated that, in these latter two cases, the rail transporter paid the direct costs of response and clean-up, and DEC incurred oversight costs that totaled slightly more than $10,000 for both incidents.

In its application, AWHMT challenges Tennessee's remedial action fee on the grounds that it is not "fair" and that it is not being used for purposes that are related to the transportation of hazardous material.

2. The Fairness Test

Both AWHMT and DEC have referred to the Commerce Clause as providing the standards for a determination whether the Tennessee remedial action fee is "fair" within the meaning of 49 U.S.C. 5125(g)(1). AWHMT contends that, because the remedial action fee is set at a "flat rate" for all transporters who pick up or deliver hazardous wastes within Tennessee, it fails to meet the "internal consistency" test discussed in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 97 S.Ct. 2829 (1987). AWHMT cited the Scheiner case, 483 U.S. at 290-291, as holding that "because they are unapportioned, flat fees cannot be said to be " 'fairly related' to a feepayer's level of presence or activities in the fee-assessing jurisdiction." It cited four State court decisions in cases also brought by the American Trucking Associations, Inc. (ATA) that "strike down, enjoin, or escrow flat hazardous materials taxes and fees": Wisconsin, 556 N.W.2d 761 (Wis. Ct. App.), *review denied*, 560 N.W.2d 274 (1996); Massachusetts, 613 N.E.2d 95 (1993); Maine, 595 A.2d 1014 (1991); and New Jersey, No. 11562-92 (N.J. Tax. Ct., March 11, 1998).[5]

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[5] After remand by the New Jersey Supreme Court, 713 A.2d 497 (1998), the Appellate Division reversed and remanded this case with directions to the State to apply to DOT for a determination on the fairness of New Jersey's hazardous waste transporter registration fee. Docket No. A-6334-97T3F (June 15, 1999). RSPA understands that the

(Continued on following page)

AWHMT also asserted that the DEC remedial action fee is inherently "unfair" because of the possible cumulative effect if other jurisdictions charge similar fees:

> Some motor carriers, otherwise in compliance with the HMRs, will inevitably be unable to shoulder multiple flat fees, and thus will be excluded from some sub-set of fee-imposing jurisdictions. If the State's flat fee scheme is allowed to stand, similar fees must be allowed in the Nation's other 30,000 non-federal jurisdictions. The cumulative effect of such outcome would be not only a generally undesirable patchwork of regulations necessary to collect the various fees, but the balkanization of carrier areas of operation and attendant, unnecessary handling of hazardous materials as these materials are transferred from one company to another at jurisdictional borders. The increased transfers would pose a serious risk to safety, since "the more frequently hazardous material is handled during transportation, the greater the risk of mishap."[6]

HMAC also argued that a

> flat fee of $650 per year * * * is clearly unfair to interstate carriers. If such fees were to be enacted by other States or jurisdictions, it would lead to assessments on interstate carriers many times the rates paid by local carriers for the

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Appellate Division has denied motions for reconsideration of its June 15, 1999 decision and that both ATA and the State of New Jersey have appealed this decision to the New Jersey Supreme Court. AWHMT is affiliated with ATA.

[6] The quoted language is from *Missouri Pac. R.R. v. Railroad Comm'n of Texas*, 671 F. Supp. 466, 480-81 (W.D. Tex.)

same number of miles. A fee of this magnitude applied by 50 States would result in a cost to a single carrier of more than $32,000.

DEC has asserted that its remedial action fee is not unreasonably high because in 1997 transporters paid only about 6% of the total fees collected. DEC stated that its fee does not differentiate between interstate and intrastate carriers, because both pay the same $650 amount per year. Although not "conced[ing] that the fee is a flat fee," DEC does "acknowledge that all of the persons in the small subset of payers who are transporters of hazardous waste all pay the same amount." It contended that the *Scheiner* case is not dispositive, regardless of whether the remedial action fee is considered a "tax" or a regulatory "fee."

DEC stated that, because this fee is not used to pay the government's "general debts and liabilities," it is not a tax, but rather a "fee" which is "charged by the government in connection with the exercise of its police function to help defray costs of the government's provision of a specific service." This fee, DEC stated, helps "defray the State's costs in the establishment and maintenance of a fund used to identify, investigate and remediate sites where there is a release or threatened release of hazardous substances," including "'maintaining a capability for emergency response" when the actual or threatened release results from the transport of hazardous materials." It contended that the decisions in *V-1 Oil Co. v. Utah State Dept. of Public Safety*, 131 F.3d 1415 (10th Cir. 1997), and *Interstate Towing v. Cincinnati*, 6 F.3d 1154 (6th Cir. 1993), hold that uniform fees that are used to perform inspections of LPG facilities (in *V-1 Oil*) or tow trucks (in *Interstate Towing*) do not discriminate against interstate commerce. DEC also referred to *Evansville-Vanderburgh*

Airport Auth. v. Delta Airlines, Inc., 405 U.S. 707, 717, 92 S.Ct. 1349, 1355 (1972), as approving a $1.00 charge for each departing passenger on both interstate and intrastate flights as "a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed."

DEC argued that "tax cases such as *Scheiner*" do not invalidate its remedial action fee. It stated that "Tennessee's fee provision does not explicitly treat out-of-state interests differently," and that only transporters who pick up or deliver hazardous waste in the State must pay the fee, not all "truckers who merely enter the State." In addition, DEC asserted that there should be no "concern about burdensome multiple taxation," because "If all the states were to adopt a law identical to Tennessee's, the highest number of them that would assess the fee on a particular shipment would be two, the beginning and terminating states." DEC cited *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331 (1995), and *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582 (1989), as situations where two States might permissibly impose taxes on the same interstate transaction, *i.e.*, a telephone call between persons in different States (*Goldberg*) or the purchase of a bus ticket from one State to another (*Jefferson Lines*). DEC maintained that *Scheiner* has not "invalidated all flat taxes, but rather focused on "the methods by which the flat taxes are assessed." DEC also argues that the remedial action fee "is apportioned, as much as it can be," because

> there is no relation between miles driven and the potential cost of clean up if there is an accident. One of the most significant factors in the expense of a clean-up is the location of the spill, e.g., the proximity to a stream or the nature of the

> subsurface conditions and whether they impede the migration into ground water. * * * These cases [*Scheiner* and *Goldberg*] show that the commerce clause does not require the adoption of an apportionment formula that does not make sense.

In its rebuttal comments, AWHMT disagreed with each of DEC's arguments. AWHMT stated that the amount of the Tennessee remedial action fee is not reasonable because, except for one other State, it is the highest "flat, unapportioned" fee imposed on transporters of hazardous materials, and it is excessive when compared to "the level of the transporter's instate activity" or the "DEC clean-up costs, even if transportation-related." AWHMT asserted that mileage "is plainly relevant to the risk imposed upon the DEC, or the State for that matter, by the transportation of hazardous waste." Citing the decisions in the Maine (595 A.2d at 1017) and Massachusetts (613 N.E.2d at 103) cases, AWHMT argued that the factors cited by DEC do not vary between interstate and intrastate carriers and that *Scheiner* requires a State to apportion its fees based on mileage that the interstate carrier travels within the State, unless it is impracticable to do so.

AWHMT also noted that RSPA takes into account the number of high mileage transportation corridors in a State in allocating grants under the Hazardous Materials Emergency Preparedness (HMEP) grants program, carried out in accordance with 49 U.S.C. 5116. AWHMT stated that Tennessee received more than $500,000 from RSPA under the HMEP grant program between 1993 and 1996 (and a total of $19.4 million over the FY '92 – FY '96 period in Federal assistance for preparing and responding

to transportation emergencies, according to a Department of Energy report).

AWHMT stressed that the remedial action fee is an annual fee, which is the same regardless of the number of shipments into or from Tennessee, and that an interstate carrier is potentially exposed to a cumulative burden of $32,500 if every State adopted a similar fee. It is because the fee is set on an annual basis, rather than per shipment, AWHMT stated, that the fee discriminates against the interstate carrier who "would pay a fee up to 49 times higher than the intrastate carrier for the same level of total covered operations."

AWHMT also asserted that the same Commerce Clause standards apply, whether Tennessee calls the remedial action fee a tax or a fee, and that these fees are "wholly unlike" the user fees in the *Evansville-Vanderburgh* case and the inspection charges in *V-1 Oil* and *Interstate Towing* because they are not related to the usage of a facility or the services provided by the State. It stated that any language in *Evansville-Vanderburgh* sanctioning "flat, annual user charges" (which were not involved in that case) cannot be relied on following the *Scheiner* case. And it disputed DEC's argument that the "internal consistency" test should not apply to Tennessee's remedial action fee, stating:

> An interstate carrier faced with the prospect of paying $650 plus permit fees in advance of any contract for at least a single delivery or pickup of waste in Tennessee is subject to pressure to avoid the State altogether. By the same token, if every State implemented a system like the DEC remedial action, Tennessee transporters would be pressured to stay out of interstate commerce. The

> DEC remedial action fee thus runs squarely afoul of the fundamental Commerce Clause principle that "revenue measures must maintain state boundaries as a neutral factor in economic decision-making." [*Scheiner*, 483 U.S. at 283]

AWHMT also disagreed with DEC's argument that the remedial action fee is justified because the State regulates hazardous waste more closely than it does hazardous substances. According to AWHMT, both must be transported in accordance with the HMR, which requires the use of the Uniform Hazardous Waste Manifest for hazardous wastes (but not other hazardous materials) and refers to the Environmental Protection Agency's requirement that a transporter of hazardous waste clean up any release during transportation. See 49 CFR 171.3 (note), 172.205; 40 CFR Part 263. AWHMT asserted that, "[i]f environmental protection fee were in fact the goal, this fee would apply to all hazmat carriers, not just hazwaste transporters picking up or delivering hazardous waste in the State."

In *Evansville-Vanderburgh*, the Supreme Court found that a state or local "toll" would pass muster under the Commerce Clause so long as it "is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred." 405 U.S. at 716-17, 92 S.Ct at 1355. In that case, the Court also indicated that "a State may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive." 405 U.S. at 715, 92 S.Ct. at 1355. However, in *Scheiner*, the Court limited the application of this latter proposition to those situations where a flat tax is "the only practicable means of collecting revenues from

users and the use of a more finely graduated user-fee schedule would pose genuine administrative burdens." 483 U.S. at 296, 107 S.Ct. at 2847. More recently, the Court stated that "a levy is reasonable under *Evansville* if it (1) is based on some fair approximation of the use of the facilities, (2) is not excessive in relation to the benefits conferred, and (3) does not discriminate against interstate commerce." *Northwest Airlines, Inc. v. Kent*, 510 U.S. 355, 367-68, 114 S.Ct. 855, 864 (1994).

As a fixed annual fee, regardless of the number of pick-ups or deliveries of hazardous waste within the State, Tennessee's remedial action fee differs from the per-trip fees in *Evansville-Vanderburgh* and from the sales or gross receipts taxes on specific interstate transactions in the *Jefferson Lines* and *Goldberg* cases. It is also different from the fees charged to offset inspections performed by the State in the *V-1 Oil* and *Interstate Trucking* decisions, where the cost of performing a required inspection would be expected to the same amount for both interstate and intrastate companies. There is an absence of any evidence that Tennessee's $650 annual fee has any approximation to transporters' use of roads or other facilities within the State, or that "genuine administrative burdens" prevent the application of a more finely graduated user fee to transporters who pick up or deliver hazardous waste within the State. Accordingly, Tennessee's remedial action fee fails the test of "reasonableness" in *Evansville-Vanderburgh*.

This test appears to be the most appropriate one for interpreting the fairness requirement in 49 U.S.C. 5125(g)(1). RSPA notes that the House Committee on Energy and Commerce first used the word "reasonable" in referring to this requirement, H.R. Report No. 101-444,

Part 1, p. 49 (1990), although this evolved into "equitable" in the 1990 amendments, Pub. L. 101-615, § 13, 104 Stat. 3260, and then to "fair" in the 1994 codification of the Federal hazardous material transportation law. Pub. L 103-272, 108 Stat. 783. As noted by AWHMT, Senator Exon subsequently stated in floor debate that, "even though the recodification refers to fees that are 'fair' rather than 'equitable,' the usual constitutional commerce clause protections remain applicable and prohibit fees that discriminate or unduly burden interstate commerce." Cong. Rec. S11324 (Aug. 11, 1994).

RSPA notes that it is not simply a potential for multiple fees, but the lack of any relationship between the fees paid and the respective benefits received by interstate and intrastate carriers, that establishes discrimination against interstate commerce. As the Massachusetts Supreme Judicial Court stated in the case brought by ATA challenging that State's hazardous waste transporter fee:

> [as] viewed from the perspective of the user, as it must be, it is apparent that the fee does not vary on any "proxy for value" obtained from the Commonwealth. An interstate hazardous waste transporter which travels just one time in the Commonwealth must pay the same fee as a local hazardous waste transporter. It is therefore apparent that the "privilege" of using the compliance program is more valuable to local transporters so that the practical effect of apportioning total costs on a per vehicle basis is to discriminate against interstate commerce.

415 Mass. at 347, 613 N.E.2d at 102. The Wisconsin Court of Appeals discussed the difference between a tax on

"services provided by disposal facilities" within the State, which

> would be constitutionally permissible under the Commerce Clause because the tax would be imposed on the delivery of services within the state. Chapter SERB 4 fees are not related to the services provided by in-state disposal facilities to interstate transporters but to carriers who cross the state line to use a facility in Wisconsin. Such fees are not "apportioned" in that they are unrelated to the extent of the mileage traveled within the state. Such a flat tax or fee clearly violates the spirit of the Commerce Clause to avoid the economic Balkanization that plagued relations among the Colonies and later among the States under the Articles of Confederation.

556 N.W.2d at 766-67.

The statutory provisions directing DOT to issue Federal regulations governing uniform forms and procedures for State registration and permitting of persons who offer or transport hazardous materials (to be based on the recommendations of a working group) specifically provide that DOT's regulations may "not define or limit the amounts of a fee a State may impose or collect." 49 U.S.C. 5119(c)(1). RSPA "has never relied on the potential cumulative effect of a [fee] requirement as a basis for finding inconsistency," IR-17, Illinois Fee on Transportation of Spent Nuclear Fuel, 51 FR 20926, 20934 (June 9, 1986), although RSPA has previously acknowledged the "impact of widespread adoption of such fees [may be] relevant to Commerce Clause litigation." IR-17, Action on Appeal, 53 FR 36200, 36201 (Sept. 25, 1987). Here, there is no showing that the potential for other States to adopt fees, by itself, makes the Tennessee remedial action fee unfair.

Because Tennessee's remedial action fee imposed on hazardous waste transporters is not based on some fair approximation of the use of the facilities and discriminates against interstate commerce, it is not fair and violates 49 U.S.C. 5125(g)(1) and is preempted by Federal hazardous material transportation law.

3. The "Used For" Test

DEC acknowledged that "many of the situations the fund is used for are not related to transportation," but argued that it should not have to create "two sub-funds, one for transportation incidents and one for everything else." If so, DEC claimed, there would be greater total costs for the additional "staff to administer the program [and] it is quite likely that the transporters would have to pay a much larger fee to support a fund capable of paying the costs of a significant removal and remediation effort at a hazardous substance site."

DEC refused to concede that "any money paid by a transporter has actually been paid for any of these other situations or purposes because the fund has not been below $170,000 in the time period of concern." It also stated that "Congress clearly authorized fees such as Tennessee's" because

> The Hazardous Waste Remedial Action Fund is the only source of funds available to the Department of Environmental Conservation, or the State of Tennessee, which can be used to hire contractors to address emergencies caused by spills of hazardous waste resulting from transportation accidents.

DEC argued that even though it has spent less than $15,000 from this fund in cleaning up highway and rail incidents, "[i]t just happens that the liable party is doing that work rather than the state's contractor." DEC asserted that the fund provides the capability for emergency response, including developing, implementing, and supervising contracts, and that it is inappropriate to compare receipts and costs in any single year. It stated that "§ 5125(g) does not require that we look into what events occur in what years with the possible result that the fee would be preempted in some years and not in others."

DEC contrasts its remedial action fee with the fees charged by Los Angeles County which RSPA found to be preempted in PD-9(R), 60 FR 8774, 8784 (Feb. 15, 1995), petition for reconsideration pending. It stated that the fees considered in PD-9(R) paid for administration of a requirement that businesses plan for emergency response to hazardous materials not in transportation, rather than the State's own capability for emergency response to a transportation incident. DEC also argued that "what the fees are actually spent on is irrelevant," under the *Evansville-Vanderburgh* case and *New Hampshire Motor Transport Ass'n v. Flynn*, 751 F.2d 43 (1st Cir. 1984). These cases, according to DEC, show that "it is permissible under the commerce clause and the HMTA to combine the purposes of a fund."

In its application, AWHMT asserted that Tennessee's remedial action fee is preempted because none of the uses of the Hazardous Waste Remedial Action Fund "address enforcement and emergency response for transportation of hazardous materials within the meaning of 49 U.S.C. 5125(g)(1)." In rebuttal comments, AWHMT questions whether "inactive hazardous substance sites" properly

include the location of a hazardous material transportation incident, because the carriers are known parties from which the State can recover clean-up costs. It also questioned whether the "'clean up' after an emergency has been abated is 'transportation-related' within the meaning of 49 U.S.C. 5125(g)(1)." AAR agreed that none of the purposes listed in Tennessee Code 68-212-205, for which the fund may be used, "target transportation activities." HMAC stated that, while these monies may be used "for many worthwhile purposes * * * the use of funds for these activities is not related to the transportation of hazardous material, as required by Federal statute, and therefore not permitted."

AAR also stated in its rebuttal comments that a "separate transportation program" for use of the remedial action fees would not necessarily involve greater costs because "Tennessee can create a separate program with shared administrative costs." AAR argued that, because there is no segregation of the fees paid by transporters of hazardous waste, it is impossible to find that these fees are being used only for transportation purposes, as required by § 5125(g)(1). AAR pointed out that the transporters themselves, rather than the State, have paid the cost of cleaning up train incidents.

With respect to DEC's statement that the Hazardous Waste Remedial Action Fund is the only source of funds available to clean up spills of hazardous waste in transportation, AAR contended that, even if correct, this point is irrelevant:

> Congress did not add a qualification that a State fee would not be preempted if it were the only source of funds for a particular purpose. * * * [T]here is nothing to prohibit Tennessee

> from developing an emergency response capability utilizing a fee that does not violate the dictates of 49 U.S.C. § 5125(g).

AWHMT referred to the responsibility of transporters to respond to an incident and the Federal financial responsibility requirements in 49 CFR Part 387 to cover environmental damage. It also pointed to Federal assistance, including grants by RSPA under the HMEP program.

In response to DEC's arguments that it had not actually used fees collected from transporters for non-transportation purposes, AWHMT addressed several points. It argued that the fact that the funds are commingled in a single fund precludes a claim of "non-use," that the State may not properly collect fees on transportation and hold them indefinitely because § 5125(g)(1) requires that they be "used" for transportation-related activities, and that the total amount collected from transporters is at least $500,000, rather than the $170,000 just for 1996.

CERCLA was enacted "to provide for a national inventory of inactive hazardous waste sites" and to authorize EPA "to take emergency assistance and containment actions with respect to such sites," finances by a "Superfund." H.R. Report No. 96-1016, Part I, Interstate and Foreign Commerce Committee, p. 17 (May 16, 1990), as reprinted in 1980 U.S. Code Congressional and Administrative News, pp. 6119-20. In 1986, Congress amended CERCLA to provide additional funding "to clean up the Nation's worst abandoned hazardous waste sites and uncontrolled leaking underground storage tanks." H.R. Report No. 99-253, Part I, Energy and Commerce Committee, p. 54, as reprinted in 1986 U.S. Code Congressional and Administrative News, p. 2836. While an "inactive" or "abandoned" waste site could result from a release in

transportation, it is clear that the primary purpose of the Superfund was not to provide for the cleanup of transportation incidents.

Tennessee acknowledges that the primary purpose of its remedial action fund is similarly to clean up "inactive hazardous substance sites." The State argues that the fund is also available (and is the only source for) cleaning up a release of a hazardous substance in transportation, but it admits that it has spent less than $15,000 in supervising cleanup activities conducted by transporters – out of the approximately $170,000 it collects each year. Without providing specific figures, Tennessee seems to claim that the unspecified excess that has been built up since 1994 is simply being kept in reserve for possible future transportation incidents.

This does not satisfy the requirement in 49 U.S.C. 5125(g)(1) that hazardous material transporter fees must be "used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response." If the State prefers not to create and maintain a separate fund for fees paid by hazardous materials transporters, then it must show that it is actually spending these fees on the purposes permitted by the law. In this area where only the State has the information concerning where these funds are spent, more specific accounting is required. Under section 5125(g)(2)(B), upon RSPA's request, a State must report on "the purposes for which the revenues from the fee are used." In the April 6, 1998 public notice, RSPA asked Tennessee to set forth in detail how much it collected and how it used the fees it collected in fiscal year 1996-97. Although DEC's comments included information on the amounts of remedial action fees collected, the State

accounted for less than $15,000 in expenditures. Although it claims that the current balance in the remedial action fund exceeds the amount collected from transporters in any one year, DEC has failed to demonstrate that none of the fees collected from transporters were spent for non-transportation purposes. Nor has it justified imposing fees on transporters of hazardous waste simply to create a large surplus for the future.

Because Tennessee is not using the remedial action fees paid by hazardous waste transporters for purposes related to transporting hazardous material, that fee violates 49 U.S.C. 5125(g)(1) and is preempted by Federal hazardous material transportation law.

C. Written Notification of Incidents

The HMR require a carrier to submit to RSPA, "within 30 days of the date of discovery," a written report of certain incidents that occur during the course of transportation, including any "unintentional release of hazardous materials from a packaging (including a tank) or [when] any quantity of hazardous waste has been discharged during transportation." This report must be submitted on DOT Form F 5800.1 and, when it pertains to a discharge of hazardous waste, a copy of the hazardous waste manifest must be attached, and "[a]n estimate of the quantity of the waste removed from the scene, the name and address of the facility to which it was taken, and the manner of disposition of any removed waste must be entered in Section IX of the report form." 49 CFR 171.16(a).

Section 171.16 was added to the HMR in 1970 in response to a recommendation of the National Transportation Safety Board that DOT develop and establish a

uniform system for reporting incidents in the transportation of hazardous materials by all modes. Final Rule, Reports of Hazardous Materials Incidents, 35 FR 16836, 16837 (Oct. 31, 1970); *see also* RSPA's notice of proposed rulemaking (NPRM), 34 FR 17450 (Oct. 29, 1969). In the NPRM, RSPA stated that:

> The information derived from these reports will be used by the Department: (1) As an aid in evaluating the effectiveness of the existing regulations; (2) to assist in determining the need for regulatory changes to cover changing transportation safety problems; and (3) to determine the major problem areas so that the attention of the Department may be more suitably directed to those areas.

Id. In 1989, the time for submitting written incident reports was increased from 15 days to 30 days after the carrier's discovery of the incident, and DOT Form F 5800.1 was revised. Final Rule, Detailed Hazardous Materials Incident Reports, 54 FR 25806, 25813 (June 19, 1989). RSPA has recently begun a new rulemaking proceeding to evaluate the need for any change in the reporting requirements and consider changes to DOT Form F 5800.1 to obtain more useful information and reduce the burdens on the carriers who are required to submit these reports. See RSPA's advance notice of proposed rulemaking, 64 FR 13943 (March 23, 1999).

Under DEC Rule 1200-1-11-.04(4)(a)4, a carrier must also send a written report to DEC "on each hazardous waste discharge during transportation that occurs in" Tennessee. This written report must be submitted "[w]ithin fifteen days of occurrence," and must include specified information about the discharge, "a discussion of

the cause of the emergency, and a summary of the emergency response (including the treatment or disposition of any spilled waste or contaminated material)." A copy of the hazardous waste manifest must be included with the report. The note to DEC Rule 1200-1-11.-04(4)(a)4 indicates that a copy of DOT Form F 5800.1 "shall suffice for this report provided that it is properly completed and supplemented as necessary to include all information required by this paragraph."

Although AAR contended that DEC requires "more information [to] be provided" than on DOT Form F 5800.1, and DEC admitted that its requirement calls for "additional information to be submitted besides what is required on DOT form 5800.1," no party specified what additional information is required. Conceding that its written incident notification requirement is preempted, DEC stated that its "[s]taff has been advised to amend those rules accordingly." In rebuttal comments, AWHMT asserted that DEC has not clarified whether it intends to eliminate its written incident notification requirement or revise that requirement to either be more "consistent with the data sets on DOT form 5800.1 or otherwise require carriers to provide to the DEC a copy of the DOT form 5800.1." DEC Rule 1200-1-11-.04(4)(a)4 has not been revised in the current (March 1999) version of DEC's rules available on the State of Tennessee internet homepage.

Aside from the differing time periods in which the reports must be filed, and issues concerning the information that must be included, AWHMT refers to RSPA's prior holdings that Federal hazardous material transportation law preempts a State requirement for the carrier to directly submit a copy of the incident report form that it must send to RSPA. HMAC states that "Federal law does

not require localities to receive written reports when hazardous waste releases occur within their jurisdiction."

In IR-2, RSPA contrasted State requirements for submission of follow-up written reports with the separate need for local emergency responders to have immediate oral or telephonic notification of an transportation incident involving hazardous materials. RSPA stated that:

> The written notice required to be supplied to [DOT] pursuant to 49 CFR 171.16 precludes the State from requiring additional written notice directed to hazardous materials carriers. * * * In light of the Federal written notice requirement, however, it is inappropriate for a State to impose an additional written notice requirement to apply solely to carriers already subject to the Hazardous Materials Regulations. The detailed hazardous materials incident reports filed with [DOT] are available to the public.

44 FR at 75568, affirmed on appeal in IR-2(A), 45 FR 71881, 71884 (Oct. 30, 1980), and in *National Tank Truck Carriers, Inc. v. Burke*, 535 F. Supp. 509 (D.R.I. 1982), *aff'd*, 698 F.2d 559 (1st Cir. 1983).

In IR-3, Boston Rules Governing Transportation of Certain Hazardous Materials Within the City, 46 FR 18918, 18924 (Mar. 26, 1981), RSPA referred to its earlier decision in IR-2 and the procedures for RSPA to provide to a "designated State agency" copies of the written reports required by 49 CFR 171.16. RSPA reiterated its ruling that a State or locality may not require a carrier to directly submit a copy of the DOT Form F 5800.1:

> Subsequent written reports required within 15 days by DOT are not necessary to local emergency response. These reports themselves are

> publicly available, and [RSPA] is prepared to routinely send copies of written reports to a designated State agency on request. Copies of written reports required by DOT * * * may not be required by [the City's ordinance].

46 FR at 18924. In response to an administrative appeal submitted by the City of Boston, RSPA further explained that:

> the information in a written incident report * * * will very often be of only limited usefulness, is not time-sensitive, and in any event can be obtained by the City [from RSPA] with only a minimum of effort. If the City in fact intends to make serious use of the information in DOT incident reports, the effort to obtain it from [RSPA] rather than the carrier should not be significant. Accordingly, we reaffirm our previous conclusion that Boston's requirement that carriers submit written reports is redundant, unnecessary, and inconsistent with the HMTA and HMR.

IR-3(A), 47 FR 18457, 18462 (Apr. 29, 1982). *Accord*, IR-31, Louisiana Statutes and Regulations on Hazardous Materials Transportation, 55 FR 25572, 25582 (June 21, 1990), appeal dismissed as moot, 57 FR 41165 (Sept. 9, 1992), where RSPA found that

> the provisions of State law which require the submission of *written* accident/incident reports are redundant with Federal requirements (particularly 49 CFR 171.16), tend to undercut compliance with the HMR requirements, and thus are inconsistent. [citations] This rationale also applies to requirements to provide copies of the incident reports filed with [RSPA]; as indicated

> in IR-3, *supra*, such a requirement is inconsistent, but [RSPA] is prepared to routinely send copies of those reports to a designated state agency on request.

In the 1990 amendments to the HMTA, Congress provided that non-Federal requirements on written incident notification are preempted unless they are substantively the same as in the HMR. 49 U.S.C. 5125(b)(1)(D). In H.R. Report No. 101-444, Part I, at 34-35 (1990), the House Committee on Energy and Commerce set forth its belief that

> uniform requirements for written notices and reports describing hazardous materials incidents will allow for the development of an improved informational database, which in turn may be used to assess problems in the transportation of hazardous materials. Without consistency in this area, data related to hazardous materials incidents may be misleading and confusing. Additional State and local requirements would also be burdensome on those involved in such incidents and may lead to liability for minor deviations.

DOT has long encouraged States to adopt and enforce requirements for transporting hazardous materials that are consistent with the HMR. Under its Motor Carrier Safety Assistance Program, see 49 CFR Part 350, FHWA provides grants to States that adopt and enforce requirements that are compatible with both the HMR and the FHWA's Federal Motor Carrier Safety Regulations (FMCSR) at 49 CFR Parts 390-399.

Tennessee has adopted the HMR, including 49 CFR 171.16, as State law, Rule 1200-2-1-.32.[7] The State received more than $1.8 million in fiscal year 1999 from DOT to enforce the HMR and the FMCSR. Accordingly, Tennessee may require a carrier to file a written incident report with RSPA, under the same conditions specified in 49 CFR 171.16, and it may impose penalties on a carrier that fails to file the required written incident report with RSPA. Tennessee may also obtain from RSPA copies of incident reports filed by carriers in order to enforce this filing requirement and to conduct follow-up investigations of incidents occurring within the State. In each of these respects, Tennessee is acting "substantively the same as" Federal law. However, Tennessee may not require a carrier to file a copy of the DOT Form F 5800.1 report, or a separate incident report, directly with the State. This last requirement is substantively different from the HMR.

DEC Rule 1200-1-11.-04(4)(a)4 is preempted because it is not substantively the same as 49 CFR 171.16.

IV. Ruling

Federal hazardous material transportation law preempts:

1. Tennessee Code 68-212-203(a)(6) and Rule 1200-1-13.03(1)(e), requiring a transporter who picks up or

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[7] Tennessee Code 68-212-107(d) also provides that "Regulations providing requirements for the transportation, containerization, and labeling of hazardous waste shall be consistent with those issued by the United States department of transportation * * * *"

delivers hazardous waste within the State to pay a remedial action fee, currently set at $650 per year.

2. Tennessee Rule 1200-1-11-.04(4)(a)4, requiring a transporter of hazardous waste to submit a written report on a discharge of hazardous waste during transportation.

IV. [sic] **Petition for Reconsideration/Judicial Review**

In accordance with 49 CFR 107.211(a), "[a]ny person aggrieved" by this decision may file a petition for reconsideration within 20 days of publication of this decision in the **Federal Register**. Any party to this proceeding may seek review of RSPA's decision "in an appropriate district court of the United States * * * not later than 60 days after the decision becomes final." 49 U.S.C. 5125(f).

This decision will become RSPA's final decision 20 days after publication in the **Federal Register** if no petition for reconsideration is filed within that time. The filing of a petition for reconsideration is not a prerequisite to seeking judicial review of this decision under 49 U.S.C. 5125(f).

If a petition for reconsideration of this decision is filed within 20 days of publication in the **Federal Register**, the action by RSPA's Associate Administrator for Hazardous Materials Safety on the petition for reconsideration will be RSPA's final decision. 49 CFR 107.211(d).

Issued in Washington, D.C. on September 30, 1999.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 99-26037 Filed 10-5-99; 8:45 am]

BILLING CODE 4910-60-P

APPENDIX F

49 U.S.C. § 5125(d) (1997)

(d) Decisions on preemption. – (1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of this section. The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.

(2) After consulting with States, political subdivisions of States, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.

(3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent

jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

APPENDIX G

49 C.F.R. §§ 107.203 to 107.213 (2002)

PREEMPTION DETERMINATIONS

§ 107.203 Application.

(a) With the exception of highway routing matters covered under 49 U.S.C. 5125(c), any person, including a State or political subdivision thereof or an Indian tribe, directly affected by any requirement of a State or political subdivision thereof or an Indian tribe, may apply to the Associate Administrator for a determination of whether that requirement is preempted by § 107.202 (a) or (b).

(b) Each application filed under this section for a determination must:

(1) Be submitted to Associate Administrator for Hazardous Materials Safety, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. Attention: Hazardous Materials Preemption Docket;

(2) Set forth the text of the State or political subdivision or Indian tribe requirement for which the determination is sought;

(3) Specify each requirement of the Federal hazardous material transportation law or the regulations issued thereunder with which the applicant seeks the State or political subdivision or Indian tribe requirement to be compared;

(4) Explain why the applicant believes the State or political subdivision or Indian tribe requirement should or should not be preempted under the standards of § 107.202; and

(5) State how the applicant is affected by the State or political subdivision or Indian tribe requirement.

(c) The filing of an application for a determination under this section does not constitute grounds for noncompliance with any requirement of the Federal hazardous material transportation law or the regulations issued thereunder.

(d) Once the Associate Administrator has published notice in the FEDERAL REGISTER of an application received under paragraph (a) of this section, no applicant for such determination may seek relief with respect to the same or substantially the same issue in any court until final action has been taken on the application or until 180 days after filing of the application, whichever occurs first. Nothing in § 107.203(a) prohibits a State or political subdivision or Indian tribe, or any other person directly affected by any requirement of a State or political subdivision thereof or Indian tribe, from seeking a determination of preemption in any court of competent jurisdiction in lieu of applying to the Associate Administrator under paragraph (a) of this section.

[Amdt. 107-24, 56 FR 8622, Feb. 28, 1991, as amended by Amdt. 107-25, 57 FR 20428. May 13, 1992; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.205 Notice.

(a) If the applicant is other than a State, political subdivision, or Indian tribe, the applicant shall mail a copy of the application to the State, political subdivision, or Indian tribe concerned accompanied by a statement

that the State, political subdivision, or Indian tribe may submit comments regarding the application to the Associate Administrator. The application filed with the Associate Administrator must include a certification that the applicant has complied with this paragraph and must include the names and addresses of each State, political subdivision, or Indian tribe official to whom a copy of the application was sent.

(b) The Associate Administrator will publish notice of, including an opportunity to comment on, an application in the FEDERAL REGISTER and may notify in writing any person readily identifiable as affected by the outcome of the determination.

(c) Each person submitting written comments to the Associate Administrator with respect to an application filed under this section shall send a copy of the comments to the applicant and certify to the Associate Administrator that he or she has complied with this requirement. The Associate Administrator may notify other persons participating in the proceeding of the comments and provide an opportunity for those other persons to respond. Late-filed comments are considered so far as practicable.

[Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.207 Processing.

(a) The Associate Administrator may initiate an investigation of any statement in an application and utilize in his or her evaluation any relevant facts obtained by that investigation. The Associate Administrator may solicit and accept submissions from third persons relevant

to an application and will provide the applicant an opportunity to respond to all third person submissions. In evaluating an application, the Associate Administrator may consider any other source of information. The Associate Administrator on his or her own initiative may convene a hearing or conference, if he or she considers that a hearing or conference will advance his or her evaluation of the application.

(b) The Associate Administrator may dismiss the application without prejudice if:

(1) He or she determines that there is insufficient information upon which to base a determination; or

(2) He or she requests additional information from the applicant and it is not submitted.

[Amdt. 107-3, 41 FR 38171, Sept. 9, 1976, as amended by Amdt. 107-24, 56 FR 8621, 8622, Feb. 28, 1991; Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.209 Determination.

(a) Upon consideration of the application and other relevant information received, the Associate Administrator issues a determination.

(b) The determination includes a written statement setting forth the relevant facts and the legal basis for the determination, and provides that any person aggrieved thereby may file a petition for reconsideration with the Associate Administrator.

(c) The Associate Administrator provides a copy of the determination to the applicant and to any other person

who substantially participated in the proceeding or requested in comments to the docket to be notified of the determination. A copy of each determination is placed on file in the public docket. The Associate Administrator will publish the determination or notice of the determination in the FEDERAL REGISTER.

(d) A determination issued under this section constitutes an administrative determination as to whether a particular requirement of a State or political subdivision or Indian tribe is preempted under the Federal hazardous material transportation law or regulations issued thereunder. The fact that a determination has not been issued under this section with respect to a particular requirement of a State or political subdivision or Indian tribe carries no implication as to whether the requirement is preempted under the Federal hazardous material transportation law or regulations issued thereunder.

[Amdt. 107-24, 56 FR 8623, Feb. 28, 1991, as amended by Amdt. 107-25, 57 FR 20428, May 13, 1992; Amdt. 107-32, 59 FR 49131, Sept. 26, 1994; Amdt. 107-38, 61 FR 21098, May 9, 1996]

§ 107.211. Petition for reconsideration.

(a) Any person aggrieved by a determination issued under § 107.209 may file a petition for reconsideration with the Associate Administrator. The petition must be filed within 20 days of publication of the determination in the FEDERAL REGISTER.

(b) The petition must contain a concise statement of the basis for seeking review, including any specific factual or legal error alleged. If the petition requests consideration of

information that was not previously made available to the Associate Administrator, the petition must include the reasons why such information was not previously made available.

(c) The petitioner shall mail a copy of the petition to each person who participated, either as an applicant or commenter, in the preemption determination proceeding, accompanied by a statement that the person may submit comments concerning the petition to the Associate Administrator within 20 days. The petition filed with the Associate Administrator must contain a certification that the petitioner has complied with this paragraph and include the names and addresses of all persons to whom a copy of the petition was sent. Late-filed comments are considered so far as practicable.

(d) The Associate Administrator's decision constitutes final agency action.

[Amdt. 107-25, 57 FR 20428, May 13, 1992, as amended by Amdt. 107-38, 61 FR 21099, May 9, 1996]

§ 107.213 Judicial review.

A party to a proceeding under § 107.203(a) may seek review by the appropriate district court of the United States of a decision of the Associate Administrator by filing a petition with the court within 60 days after the Associate Administrator's determination becomes final. The determination becomes final when it is published in the FEDERAL REGISTER.

[Amdt. 107-38, 61 FR 21099, May 9, 1996]

APPENDIX H

Tenn. Code Ann. § 68-212.203. Remedial action fees. – (a) In addition to any other fees assessed by any law, there is hereby levied a remedial action fee on the generation and management of hazardous waste to be calculated as follows:

(1) All generators of one thousand two hundred (1,200) kilograms or greater per year shall pay an annual fee based on the amount of hazardous waste generated during the prior calendar year:

(A) In fiscal year 1994-1995, this fee shall be fifteen cents (154) per kilogram; however, the minimum annual fee due from any single generator shall be six hundred fifty dollars ($650) and the maximum annual fee shall be fifteen thousand dollars ($15,000);

(B) In fiscal year 1995-1996, this fee shall be seventeen cents (174) per kilogram; however, the minimum annual fee due from any single generator shall be six hundred fifty dollars ($650) and the maximum annual fee shall be eighteen thousand dollars ($18,000);

(C) In fiscal year 1996-1997, this fee shall be eighteen cents (184) per kilogram; however, the minimum annual fee due from any single generator shall be six hundred fifty dollars ($650) and the maximum annual fee shall be twenty thousand dollars ($20,000); and

(D) In fiscal year 1997-1998, and each year thereafter, this fee shall be twenty cents (204) per kilogram; however, the minimum annual fee due from any single generator shall be six hundred fifty dollars ($650) and the maximum annual fee shall be twenty-two thousand dollars ($22,000);

(2) In fiscal year 1994-1995, and each year thereafter, generators that ship hazardous waste excluding hazardous wastewater off-site shall pay an additional annual fee of fourteen dollars ($14.00) for each ton of hazardous waste shipped off-site during the prior calendar year;

(3) Generators that ship hazardous wastewater off-site shall pay an additional annual fee based on the amount of hazardous wastewater shipped off-site during the prior calendar year:

(A) In fiscal year 1994-1995, this fee shall be five dollars ($5.00) per ton;

(B) In fiscal year 1995-1996, this fee shall be six dollars ($6.00) per ton;

(C) In fiscal year 1996-1997, and each year thereafter, this fee shall be seven dollars ($7.00) per ton; and

(D) As used in this section, "hazardous wastewater" is wastewater that contains less than one percent (1%) by weight total organic carbon and which also contains less than one percent (1%) by weight total suspended solids;

(4) The fees levied by subdivisions (a)(2) and (3) shall also apply to out-of-state generators that treat or dispose of hazardous waste at any commercial facility located in this state. The commercial facility to which the waste is shipped shall be responsible for collecting this fee and shall remit it to the state. For the purpose of compensating the commercial facility in accounting for and remitting this fee, a commercial facility shall be allowed a deduction from the fee due, reported and paid to the department in the amount of two percent (2%) of the amount due. No

deduction from the fee shall be allowed if any such payment is delinquent;

(5) The maximum annual amount of the of-site shipping fees levied by subdivisions (a)(2), (3) and (4) due from any single generator shall not exceed fifty thousand dollars ($50,000);

(6) All persons who are issued a hazardous waste transporter permit pursuant to the Tennessee Hazardous Waste Management Act, compiled in part 1 of this chapter, shall pay an additional annual fee as follows:

(A) In fiscal year 1994-1995, this fee shall be five hundred fifty dollars ($550);

(B) In fiscal year 1995-1996, this fee shall be six hundred dollars ($600);

(C) In fiscal year 1996-1997, and each year thereafter, this fee shall be six hundred fifty dollars ($650);

(b) For the purposes of determining the amount of hazardous waste subject to the fees levied under subsection (a), the following shall be excluded:

(1) Waste which is exempted from regulation or otherwise exempted from assessment of fees in rules adopted by the board including, but not limited to, Rule 1200-1-11-.02(1)(d)(3), Rule 1200-1-11-.01(3)(c), Rule 1200-1-11-.02(1)(a) and Rule 1200-1-11-.04(1)(a)(4)(ii);

(2) Waste which is discharged directly to any publicly owned treatment works or any wastewater treatment facility permitted pursuant to § 402 of the federal Clean Water Act as amended (Pub. L. No. 92-500) or the Tennessee Water Quality Control Act, compiled in title 69, chapter 3.

However, hazardous wastewater shipped off-site to a commercial facility which discharges to a publicly owned treatment works or a permitted wastewater treatment facility is not excluded from the original generator's waste volume;

(3) Sludge from publicly owned treatment works located in the state;

(4) Bottom boiler ash and flyash from incinerators which process solely municipal waste;

(5) Hazardous wastes generated from remediation or corrective actions required by the Tennessee Hazardous Waste Management Acts of 1977 and 1983, compiled in part 1 of this chapter; the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.); and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 et seq.);

(6) Hazardous waste or hazardous waste sludges produced as a result of on-site treatment of hazardous waste. However, if the waste itself is excluded, the sludge resulting from treatment of such waste cannot be excluded;

(7) Wastes which have been recycled on-site or transported off-site to be recycled, as "recycled" is defined at 40 CFR 261, including, but not limited to, fuel blending, solvent recovery and metals recovery;

(8) Hazardous waste resulting from a spill of hazardous waste or other material which, when spilled, becomes a hazardous waste; and

(9) Hazardous wastes resulting from the removal and associated cleanup of an underground storage tank

that previously contained a hazardous waste or other material which when discarded, leaked or spilled becomes a hazardous waste.

(c) The board shall adopt rules and regulations governing the collection of fees levied under this section, and the records to be maintained in accordance with the provisions of this part. The rules and regulations shall be promulgated in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(d) The payment of fees levied under this section shall be made to the department and deposited solely to the credit of the hazardous waste remedial action fund created in § 68-212-204.

(e) For fiscal year 1994-1995 and for each fiscal year thereafter, there is appropriated from the state's general fund to the hazardous waste remedial action fund the sum of at least one million dollars ($1,000,000). This contribution must be paid to this fund in total in a new recurring appropriation each year, and shall not include any funds contributed in previous years which have not been expended. Despite any other law to the contrary, if the general assembly fails to authorize this appropriation in any given fiscal year, the maximum generator fee in that fiscal year shall be seven thousand five hundred dollars ($7,500) calculated at the rate of fourteen cents (144) per kilogram, the maximum off-site shipment fee shall be seven dollars ($7.00) per ton for hazardous waste, there shall be no fee for hazardous wastewaters, and the maximum transporter fee shall be two hundred seventy-five dollars ($275).

(f) At no time shall the maximum unobligated balance in the hazardous waste remedial action fund exceed ten million dollars ($10,000,000). Fees shall be adjusted downward so that this level is not exceeded. [Acts 1983, ch. 423, § 3; 1986, ch. 644, §§ 10, 11; 1989, ch. 321, §§ 5-7; 1989, ch. 552, §§ 8, 9; T.C.A., § 68-46-203; Acts 1994, ch. 890, § 4.]

APPENDIX I

Tenn. Comp. R. & Regs., ch.

1200-1-13-.03 REMEDIAL ACTION FUND

(1) FEES

(a) *General*

1. Purpose – The purpose of this rule is to establish a system and schedule whereby certain fees are collected by the State for deposit in the Hazardous Waste Remedial Action Fund.

2. Applicability – This rule applies to the persons and facilities specified in subpart (I) through (vi). For purposes of this paragraph "Generator" as defined in TCA Section 68-212-203 means any person, by site, whose act or process produces hazardous waste waters or hazardous wastes identified or listed in Rule 1200-1-11-.02 or whose act first causes a hazardous waste or hazardous waste waters to become subject to regulation, and "generation" means the act or process of producing hazardous wastes and/or hazardous waste water.

(i) Persons who have generated hazardous waste in quantities of 1200 kg. or more during the prior calendar year.

(ii) Persons who are issued a hazardous waste transporter permit under the "Tennessee Hazardous Waste Management Act", T.C.A. § 68-212-101 et seq.

(iii) Persons who have shipped 1200 kg. or more of hazardous waste off-site for treatment or disposal.

(iv) Out-of-state generators who treat or dispose of hazardous waste in Tennessee at a commercial facility. Such persons shall be subject to the off-site shipping fees as described in part 3 of subparagraph (c).

(v) Persons who ship hazardous wastewaters off-site for treatment or disposal.

(vi) Commercial facilities that receive wastes from out-of-state for treatment or disposal are responsible for collection of certain fees described in part 3 of subparagraph (c).

3. Payment of fees – Any person assessed a fee under this rule must submit the fee in the specified amount to the State of Tennessee. The Department may, by notice to such persons prior to the date due, further specify the manner of payment. Checks are to be made payable to the State of Tennessee.

(b) *Generation Fee* – Amount and Manner of Assessment –

Generators subject to this rule shall pay a fee based on the total amount of hazardous waste generated in the previous calendar year calculated on an as-generated (wet weight) basis in accordance with the below-listed schedule:

1. Amount of Hazardous Waste Generated in 1993	1994 Fee ($)
less than 1200 kg.	$0
1,200 kg – 4333 kg.	$650.00
4334 kg – 99,999 kg.	$.15 per kg.
100,000 kg or more	$15,000.00
2. Amount of Hazardous Waste Generated in 1994	1995 Fee ($)
less than 1200 kg.	$0
1200 kg. – 3823 kg.	$650.00
3824 kg. – 105,881 kg.	$.17 per kg.
105,882 kg. or more	$18,000.00
3. Amount of Hazardous Waste Generated in 1995	1996 Fee ($)
less than 1200 kg.	$0
1200 kg. – 3610 kg.	$650.00
3611 kg. – 111,110 kg.	$.18 per kg.
111,111 kg. or more	$20,000.00
4. Amount of Hazardous Waste Generated in 1996 and/or each year thereafter	1997 Fee ($) and each year thereafter
less than 1200 kg.	$0
1200 kg. – 3249 kg.	$650.00
3250 kg. – 109,999 kg.	$.20 per kg.
110,000 kg. or more	$22,000.00

(c) *Off-Site Shipment Fee*

1. Hazardous Waste – Any generator of twelve hundred (1200) kg. or greater per year who shipped hazardous waste (excluding hazardous wastewater) off-site for treatment or disposal during the previous calendar year is hereby assessed a fee of FOURTEEN DOLLARS ($14.00) per ton of wastes so shipped. For purposes of assessing this fee, any hazardous waste, excluding hazardous wastewater, which was shipped off-site shall be considered to have been shipped off-site for treatment or disposal.

2. Hazardous Wastewater – Any generator who shipped "hazardous wastewater", as defined in T.C.A., Section 68-212-203, off-site for treatment and disposal shall pay an off-site shipping fee in accordance with the schedule listed below:

   (i) The fee for hazardous wastewater shipped off-site in 1993 shall be five dollars ($5.00) per ton.

   (ii) The fee for hazardous wastewater shipped off-site in 1994 shall be six dollars ($6.00) per ton.

   (iii) The fee for hazardous wastewater shipped off-site in 1995, and each year thereafter, shall be seven dollars ($7.00) per ton.

3. Out-of-state generators who treat or dispose of hazardous wastes at any commercial facility located in Tennessee shall

be subject to the off-site shipping fees levied by part (c)1 and 2 above.

(i) The commercial facility to which the waste is shipped for treatment or disposal shall be responsible for collecting the off-site shipping fee and remitting it to the State by March 1 of each year.

(ii) For the purposes of compensating the commercial facility in accounting for and remitting this fee, the commercial facility shall be allowed a deduction of two percent (2%) of the total amount due the State. No deduction shall be allowed if any portion of the payment is delinquent.

(iii) Commercial facilities shall collect off-site shipping fees from out-of-state generators beginning July 1, 1994.

(iv) Any out-of-state generator desiring to claim that they generated less than 1200 kg. of hazardous wastes per year and that they are therefore excluded from payment of this fee or to claim that they have previously paid the maximum fee of $50,000, shall so certify to all receiving Tennessee facilities.

4. The maximum annual off-site shipping fee levied by part (c) 1, 2, and 3 due from any single generator shall be fifty thousand dollars ($50,000.00)

(d) *Excluded Waste*

1. For purposes of determining the amount of waste generated under subparagraph (b) and the amount of waste shipped off-site for treatment and/or disposal under subparagraph (c), the wastes listed below shall be excluded.

   (i) Waste which is exempted from regulation under Rule 1200-1-11-.02(1)(d)3, 1200-1-11-01(3)(c), 1200-1-11-.02(1)(a) and 1200-1-11-.04(a)4.(ii).

   (ii) Waste which was discharged directly to any publicly owned treatment works (POTW), or any wastewater treatment plant permitted pursuant to Section 402 of the Federal Clean Water Act as amended (Public Law 92-500) or the Tennessee Water Quality Control Act, T.C.A. § 69-3-101 et seq., (this includes permitted on-site wastewater treatment plants that discharge into the sewer system of a publicly owned treatment works). Wastes that generators transport off-site to a commercial facility which discharges to a publicly owned treatment works or a publicly owned wastewater treatment plan are not excluded from the amount of waste generated.

   (iii) Sludge from any publicly owned treatment works located in the state.

   (iv) Bottom boiler ash and flyash from incinerators which process solely municipal waste.

(v) Hazardous waste or hazardous waste sludges produced as a result of on-site treatment of hazardous waste if the waste being treated is subject to fees under this rule. If the waste being treated is excluded from fees under this rule, the sludge resulting from the treatment of said waste is not excluded from these fees.

(vi) Wastes which have been recycled on-site or transported off-site to be recycled, as the term "recycled" is defined in Rule 1200-1-11-.02(1)(a), (note that 1200-1-11-.02(1)(a) incorporates by reference to 40 C.F.R. 261.1(c)).

(vii) Hazardous wastes resulting from a spill (e.g. by a transporter in transit) of a hazardous waste or other material which, when spilled, becomes a hazardous waste.

(viii) Hazardous wastes generated from remediation or corrective actions required by the Tennessee Hazardous Waste management Act of 1977 and 1983; the Resource Conservation and Recovery Act (42 U.S.C. 6901 et seq.); and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 et seq.).

(ix) Hazardous wastes resulting from the removal and associated clean-up of an underground storage tank that previously contained a hazardous waste or other material which, when

discarded, leaked or spilled, becomes a hazardous waste.

2. A person whose waste generation is excluded or reduced pursuant to part 1 of subparagraph (d) above shall meet the generator notification requirements of Rule 1200-1-11-.03(5)(b).

(e) *Hazardous Waste Transporter Fee*

Each person issued a hazardous waste transporter permit pursuant to the Tennessee Hazardous Waste Management Act T.C.A. Section 68-212-101 *et seq.*, is hereby assessed a fee in accordance with the schedule listed below:

1. The fee for a permit issued in 1993 shall be five hundred and fifty dollars ($550.00)

2. The fee for a permit issued in 1994 shall be six hundred dollars ($600.00)

3. The fee for a permit in 1995, and each year thereafter, shall be six hundred and fifty dollars ($650.00).

(f) *Due Date of Fees, Reporting Requirements*

1. All remedial action fees from in-state generators shall be paid to the department on or before October 15 of each year.

2. Commercial facilities collecting off-site shipping fees from out-of-state generators shall pay such fees to the Department on or before March 1 of each year.

3. Transporters issued a transporter permit for any year prior to 1995 shall pay the assessed fee on or before the October 15th that immediately follows the issuance of

the permit, if the fee was not paid upon issuance.

4. Hazardous waste transporters renewing permits shall pay the fee assessed by subparagraph (e) at the time the permit is issued.

5. If any part of any fee imposed pursuant to T.C.A. 68-212-201 et seq. is not paid on or before the due date, the person or persons failing to pay such fee shall be subject to the following:

   (i) The assessment of interest in an amount equal to that allowed in T.C.A. Section 47-14-103(3).

   (ii) A civil penalty not to exceed ten thousand dollars ($10,000) for each day of violation or an amount equal to 5 percent (5%) per month of any unpaid balance, whichever is less.

6. Remedial Action Fee supporting documentation consisting of copies of the Hazardous Waste Stream Reports and Off-Site Shipping Reports must be submitted by generators of hazardous waste and hazardous waste waters by March 1 of each year.

   (i) Supporting documentation must be returned by all persons that generated and/or shipped 1200 kg. or more of hazardous waste or hazardous wastewaters in the prior calendar year.

   (ii) Any person generating and/or shipping 1200 kg. or more of hazardous waste or hazardous wastewaters who

fails to submit Remedial Action Fee supporting documentation by April 1 of each year shall be subject to the assessment of a civil penalty of not less than five hundred dollars ($500.00) and not more than ten thousand dollars ($10,000.00) per day.

(2) COST RECOVERY

(a) T.C.A. Section 68-212-207 provides for the recovery of costs incurred as a result of investigation, identification, containment and cleanup, including monitoring and maintenance, of a hazardous substance site from an identified liable party or parties.

(b) Liable parties, shall be responsible for their apportioned share of costs incurred by the State of Tennessee as a result of a response. Where costs are incurred by the State on any site, a liable party is subject to an action by the State for the recovery of the liable party's apportioned share of costs. An administrative overhead charge of no more than 15% shall be charged by the Department. Overhead charges shall be calculated and assessed on outstanding balances at the time of issuance for each billing. Monies received as payment on the part of a liable party shall be credited towards said party's share of the costs.